Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 10-____

IN THE
Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY
D/B/A AT&T CALIFORNIA,
Petitioner,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION;
MICHAEL R. PEEVEY, DIAN M. GRUENEICH,
JOHN A. BOHN, TIMOTHY ALAN SIMON,
AND NANCY E. RYAN, IN THEIR OFFICIAL CAPACITIES AS
COMMISSIONERS OF THE CALIFORNIA PUBLIC UTILITIES
COMMISSION; AND CBEYOND COMMUNICATIONS, LLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 23, 2010

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QUESTION PRESENTED

Whether 47 U.S.C. § 251(c)(2) — which requires an incumbent local exchange carrier to provide interconnection "*for* the facilities and equipment *of* any [competing] carrier" at a point "*within* the [incumbent] carrier's network" (emphases added) requires the incumbent to provide to a competing carrier, at extremely low regulated rates, all of the facilities and equipment that the competing carrier uses to span the distance (which may be miles) between its own network and the incumbent's network.

PARTIES TO THE PROCEEDINGS

Petitioner Pacific Bell Telephone Company d/b/a AT&T California was the plaintiff and an appellant in the proceedings below.

The California Public Utilities Commission ("CPUC") and Michael R. Peevey, Dian M. Grueneich, John A. Bohn, Timothy Alan Simon, and Nancy E. Ryan, in their official capacities as the current Commissioners of the CPUC, are respondents. The CPUC and the then-Commissioners* were defendants and appellees in the proceedings below.

Respondent Cbeyond Communications, LLC intervened as a third-party defendant in the district court for the purpose of pursuing a cross-appeal on an issue different from the one that was the subject matter of AT&T California's appeal, and it was an appellant in the court of appeals proceedings.

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* Rachelle Chong was a CPUC Commissioner during the period of time from the district court complaint in March 2007 until December 2009, after the case was argued in the Ninth Circuit but before that court's initial decision. She was replaced by Nancy E. Ryan in January 2010.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Pacific Bell Telephone Company d/b/a AT&T California states the following:

Pacific Bell Telephone Company d/b/a AT&T California is a wholly owned indirect subsidiary of AT&T Inc., a publicly owned corporation. AT&T Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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Pacific Bell Telephone Company d/b/a AT&T California respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

On December 10, 2010, this Court granted certiorari in *Talk America Inc. v. Michigan Bell Telephone Co.*, No. 10-313, and *Isiogu v. Michigan Bell Telephone Co.*, No. 10-329. Those consolidated petitions present the same question as this petition. Indeed, the Ninth Circuit, in the opinion under review, expressly "reject[ed] the reasoning advanced by . . . the Sixth Circuit" in *Michigan Bell*, Pet. App. 12a-13a, thus deepening the circuit conflict that this Court granted certiorari to resolve. The Court should hold this petition pending its decision in *Talk America* and *Isiogu*, and then dispose of it accordingly.

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 23a-43a) is reported at 597 F.3d 958. The order and opinion of the court of appeals amending and superseding that initial opinion (Pet. App. 1a-22a), issued in conjunction with its denial of a petition for rehearing, is reported at 621 F.3d 836. The order of the district court (Pet. App. 44a-68a) is not reported (but is available at 2008 WL 501390).

JURISDICTION

The court of appeals entered judgment on March 4, 2010, and denied a petition for rehearing on September 1, 2010 (Pet. App. 1a-2a). On November 23, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 30, 2010. *Id.* at 120a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Telecommunications Act of 1996 ("1996 Act") and Title 47 of the Code of Federal Regulations are reproduced at Pet. App. 88a-119a.

STATEMENT

1. In the 1996 Act, Congress "fundamentally restructure[d] local telephone markets" and "subject[ed]" incumbent local exchange carriers ("incumbent LECs" or "ILECs"), like AT&T California, "to a host of duties intended to facilitate market entry" by new providers of local telephone service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). "Foremost among these duties is the [incumbent] LEC's obligation . . . to share its network with competitors" by providing competing LECs ("CLECs") with leased access to "elements of the incumbent's network 'on an unbundled basis.'" *Id.* (quoting 47 U.S.C. § 251(c)(3)).

The Federal Communications Commission ("FCC") initially interpreted § 251(c)(3) to require incumbent LECs to "provide interoffice transmission facilities on an unbundled basis," including such facilities "between . . . the wire centers of incumbent LECs and requesting carriers" — that is, competing LECs.[1] The FCC also interpreted 47 U.S.C. § 252(d)(1), which sets the pricing standard for unbundled network elements, to require incumbent LECs to lease

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[1] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 439-440 (1996), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); 47 C.F.R. § 51.319(d)(1) (1996).

such elements to competitors using a methodology based on the "hypothetical" cost of a "most efficient element," "untethered to" either the incumbent LEC's "historical investment" or the cost of the "actual network element being provided." *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 501 (2002).[2] The FCC termed this pricing methodology "TELRIC" or "total element long-run incremental cost." *Id.* at 495-96.

As a result of these decisions, a competing LEC could pay TELRIC rates to lease from an incumbent LEC an "entrance facility," which is the wire that connects the incumbent LEC's "switch" (a computer that routes calls) to a competing LEC's switch.[3] Those TELRIC rates were "well below the costs the ILECs had actually historically incurred in constructing the elements." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 562 (D.C. Cir. 2004) ("*USTA II*").

2. In 2003, the FCC revisited (among other things) its prior determinations that § 251(c)(3) requires an incumbent LEC to unbundle the entrance facilities that connect an incumbent LEC's switch to a competing LEC's switch. Characterizing its prior

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[2] The Ninth Circuit erred in describing the FCC's pricing methodology as a "historical cost method." Pet. App. 7a.

[3] The Ninth Circuit, however, depicted an entrance facility as a discrete piece of the incumbent's network that is adjacent to the incumbent's switch. *See* Pet. App. 9a. The Ninth Circuit created that diagram out of whole cloth and with no support in the record before it; in fact, both AT&T California and the California Public Utilities Commission ("CPUC") had provided the Ninth Circuit with diagrams depicting an entrance facility as a wire spanning the distance between an AT&T California switch and a competing LEC's switch. *See* AT&T California Br. at 4 (June 27, 2008); CPUC Br. at 7 (July 28, 2008).

approach as "overly broad" and "misguided," the FCC now concluded that entrance facilities "exist *outside* the incumbent LEC's local network" and, therefore, are excluded as a matter of definition from the category of network elements that could be subject to unbundling. *TRO*[4] ¶¶ 365-366. The FCC explained further that excluding entrance facilities from incumbents' unbundling requirements is "consistent with the Act" because competing LECs "have control over where to locate their network facilities to minimize self-deployment costs" and should "incorporate those costs . . . into their network deployment strategies rather than . . . rely[ing] exclusively on the incumbent LEC's network." *Id.* ¶ 367.

The D.C. Circuit rejected the FCC's conclusion that entrance facilities fall outside the category of "network elements" that could be "subject to the statutory unbundling requirement[] of § 251(c)(3)." *USTA II*, 359 F.3d at 585. The court, however, did not question the FCC's policy analysis, noting that competing LECs themselves depicted "entrance facilities" "as completely stand-alone items linking a CLEC switch with an ILEC office" that "appear[] [to] *exist* exclusively for the convenience of the CLECs." *Id.* at 586. The D.C. Circuit therefore found it "anomalous that CLECs do not themselves provide" their own entrance facilities. *Id.*

In 2005, the FCC responded to the D.C. Circuit's decision. Applying the statutory "impairment" standard used to determine which elements incumbent

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[4] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*TRO*"), *vacated in part and remanded*, *USTA II*, *supra*.

LECs must unbundle pursuant to § 251(c)(3), *see Iowa Utils. Bd.*, 525 U.S. at 388-90, the FCC concluded that competing LECs are *not* impaired without unbundled access to entrance facilities: "entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC" switches. *TRRO*[5] ¶ 138. Competing LECs can "choose to locate their switches" in order to "minimiz[e] the length and cost of entrance facilities" and to "increas[e] the possibility of finding an alternative wholesale suppl[ier]." *Id.* The FCC therefore promulgated a rule stating that "incumbent LEC[s] [are] not obligated to provide . . . unbundled access" to entrance facilities. 47 C.F.R. § 51.319(e)(2)(i).

3. AT&T California sought to negotiate amendments to its interconnection agreements to conform them to AT&T California's post-*TRRO* obligations, including with respect to entrance facilities. When those negotiations failed to result in amendments, AT&T California initiated a consolidated proceeding before the CPUC.

On January 26, 2006, the CPUC, relying solely on a paragraph in the FCC's *TRRO*, issued an order in which it required AT&T California to provide entrance facilities to competing LECs at TELRIC rates pursuant to § 251(c)(2). *See* Pet. App. 85a-86a. On reconsideration, the CPUC reaffirmed its decision, contending that AT&T California's position is "clearly refuted" by *TRRO* ¶ 140. *Id.* at 77a.

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[5] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*TRRO*"), *petitions for review denied, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

4. AT&T California sought review of the CPUC's decision in federal district court. On cross-motions for summary judgment, the district court affirmed the CPUC's decision, holding that "the CPUC did not violate the *TRRO* when it required AT & T to provide CLECs with its entrance facilities as needed for interconnection." Pet. App. 59a. Like the CPUC, the district court relied entirely on *TRRO* ¶ 140.

5. On March 4, 2010, the Ninth Circuit affirmed the district court's decision, stating that it "agree[d] with our sister circuits" on this question, referring to the Seventh and Eighth Circuits, which previously had upheld state commission decisions reading *TRRO* ¶ 140 to require incumbent LECs to provide entrance facilities at TELRIC rates. Pet. App. 32a-33a (citing *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir. 2008); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009)). However, the Ninth Circuit did not address, or acknowledge the existence of, the Sixth Circuit's contrary decision in *Michigan Bell Telephone Co. v. Covad Communications Co.*, 597 F.3d 370 (6th Cir. 2010), even though AT&T California brought that decision to the Ninth Circuit's attention on February 25, 2010 (one week before the Ninth Circuit issued its opinion).

AT&T California filed a timely petition for rehearing, based in large part on the unacknowledged conflict with the Sixth Circuit's ruling. On September 1, 2010, the Ninth Circuit denied rehearing, but amended its opinion to state that the court "agree[s] with the Seventh and Eighth Circuits and reject[s] the reasoning advanced by AT & T [California] and the Sixth Circuit in its recent 2-1 decision." Pet. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

As the Ninth Circuit expressly recognized, its holding that § 251(c)(2) requires incumbent LECs to provide TELRIC-priced entrance facilities to competing LECs squarely conflicts with the Sixth Circuit's decision in *Michigan Bell*. In that case, the Sixth Circuit correctly held that a competing LEC purchasing an entrance facility from an incumbent — rather than "build[ing] its own entrance facility," "rent[ing] someone else's," or "connect[ing] directly" without using an entrance facility — must pay the incumbent LEC's tariffed rates for the entrance facility. 597 F.3d at 386. The Sixth Circuit, moreover, had rejected as "not . . . persuasive" and "entirely circular" decisions of the Seventh and Eighth Circuits, *id.* at 385-86, with which the Ninth Circuit "agree[d]," Pet. App. 12a.

On December 10, 2010, this Court granted certiorari in *Talk America* (No. 10-313) and *Isiogu* (No. 10-329) to resolve this circuit conflict. Because this case presents the same legal question as *Talk America* and *Isiogu*, and because the cases come to the Court in the same procedural posture,[6] the petition for a writ of certiorari in this case should be held pending the Court's decision in *Talk America* and *Isiogu*.

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[6] Justice Kagan took no part in the consideration of the *Talk America* and *Isiogu* petitions; on April 3, 2009, the FCC filed an *amicus* brief in *Michigan Bell*, at the request of the Sixth Circuit. The agency did not file an *amicus* brief before the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Talk America Inc. v. Michigan Bell Telephone Co.*, No. 10-313, and *Isiogu v. Michigan Bell Telephone Co.*, No. 10-329, and then disposed of accordingly.

Respectfully submitted,

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December 23, 2010

Counsel for Pacific Bell Telephone Company

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-15568 & 08-15716

PACIFIC BELL TELEPHONE COMPANY
D/B/A AT&T CALIFORNIA,
Plaintiff-Appellant,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants-Appellees,

v.

CBEYOND COMMUNICATIONS, LLC,
Defendant-Intervenor-Appellant.

Argued and Submitted Oct. 6, 2009

Filed Mar. 4, 2010

Amended Sept. 1, 2010

Before: MARY M. SCHROEDER, A. WALLACE TASHIMA and CARLOS T. BEA, Circuit Judges.

ORDER

The opinion filed on March 4, 2010 [597 F.3d 958] is amended as follows:

Replace the following text on [597 F.3d at 965]:

Both the Seventh and the Eighth circuits recently rejected AT & T's position, and have concluded that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease

entrance facilities to competitive LECs at regulated rates for the purpose of interconnection. *See Sw. Bell Tel., LP v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir.2008) ("*SWBT*"); *Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir.2008) ("*Box I*"). We agree with our sister circuits.

With:

Both the Seventh and the Eighth circuits recently rejected AT & T's position, and have concluded that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection. *See Sw. Bell Tel., LP v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir.2008) ("*SWBT*"); *Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir.2008) ("*Box I*");[11] *contra Michigan Bell Tel. Co. v. Lark*, 597 F.3d 370 (6th Cir.2010). For the reasons that follow, we agree with the Seventh and Eighth Circuits and reject the reasoning advanced by AT & T and the Sixth Circuit in its recent 2-1 decision.

Judges Schroeder and Bea vote to deny the suggestion for rehearing en banc, and Judge Tashima so recommends. All judges vote to deny the petition for panel rehearing.

The suggestion for rehearing en banc has been circulated to the full court, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35(b).

Petitioner's petition for panel rehearing and suggestion for rehearing en banc are denied.

No further filings will be accepted in this closed case.

BEA, Circuit Judge:

OPINION

This case involves the balance the Telecommunications Act of 1996 ("the Act") strikes between providing newer competitors access to previously monopolistic telecommunications markets, on the one hand, and encouraging and protecting infrastructure investments of older, incumbent telecommunications providers on the other. We must interpret two provisions of the Act that impose requirements on older, incumbent local exchange carriers ("incumbent LECs") – like appellant AT & T – to lease certain components of their existing infrastructure to rival newer, competitive carriers ("competitive LECs") – like intervenor Cbeyond.

First, we must determine whether 47 U.S.C. § 251(c)(2) requires an incumbent LEC to lease its "entrance facilities" (wires that connect rival telephone systems) to a competitive LEC at regulated rates when the competitor wishes to use the "entrance facility" to permit its own customers to reach customers of the incumbent LEC.

Second, we must determine whether 47 C.F.R. § 51.319(e)(2)(ii)(B) (the "DS1 Cap Rule"), which limits to ten the number of low-capacity DS1 telephone lines an incumbent LEC must lease to a competitive LEC at regulated (low) rates along certain routes, is a limitation which also applies to any route, regardless whether the competitive LEC is "impaired" as to the alternative to such low-capacity lines: the competitive LEC's own higher-capacity DS3 lines.

Properly to understand the terms used and the regulatory area into which we are about, some background would help.

BACKGROUND

A. The Telecommunications Act of 1996

Prior to 1996, local telephone service generally was provided by a local monopolist who offered services at prices regulated and imposed by a variety of governmental agencies. Such monopolist providers are commonly referred to as "incumbent local exchange carriers" or "incumbent LECs." Congress enacted the Act to deregulate the telecommunications market. *See generally Verizon Comms. Inc. v. FCC*, 535 U.S. 467, 475-76, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002). But, to facilitate the entry of new participants into these local markets, the Act imposes on incumbent LECs two duties relevant in this case.

Interconnection Duty at Regulated Rates.

First, the Act imposes a duty on incumbent LECs to permit "interconnection." Pursuant to 47 U.S.C. § 251(c)(2),[1] incumbent LECs must allow the competitive LEC to link its network to that of the incumbent LEC, so that customers of the competitive LEC may place calls to customers of the incumbent LEC. Without the ability to link its network to that of the incumbent LEC, the competitive LEC would have little prospect of selling its telephone services, to say nothing of competing for the customers of the incumbent LEC. A local telephone service is of little use if it cannot connect to other local telephone users.

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[1] 47 U.S.C. § 251(c)(2) provides that each incumbent LEC has "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network."

Lease of Network Parts at Regulated Rates.

Second, the Act imposes a duty that incumbent LECs "unbundle"[2] parts of their network. Each such part of the incumbent LEC's network is a "network element". Pursuant to 47 U.S.C. § 251(c)(3),[3] incumbent LECs must permit competitive LECs to lease, at regulated cost-based rates, parts of the incumbent's network, such as telephone wires, call exchanges, and routing systems. This provision promotes competition by allowing a competitive LEC to enter the telephone service market without having first to overcome capital barriers to entry, i.e., without having to construct, at high cost, every component necessary to operate a network. *See Ill. Bell Tel. Co. v. Box*, 548 F.3d 607, 609-10 (7th Cir.2008) ("*Box II*").

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[2] "Unbundling" is the process of breaking apart something into smaller parts. An example is taking a bundled computer system and unbundling it into its individual pieces such as the PC unit, monitor, keyboard, and mouse, and then selling each of these items individually. In the context of this case, "unbundling" is the term used to describe the access provided by incumbent LECs so that other service providers (i.e., competitive LECs) can buy or lease portions of the incumbent LECs' network elements, such as interconnection loops, to serve subscribers.

[3] 47 U.S.C. § 251(c)(3) provides that incumbent LECs have: "The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement [negotiated in good faith by the incumbent LEC and competitive LEC pursuant to § 251(c)(1)] and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

For example, a competitive LEC might enter a market by providing residential telephone service in two far-flung neighborhoods. Rather than having to lay its own wire to connect the two neighborhoods, the competitive LEC can, under § 251(c)(3), piggyback on the incumbent LEC's pre-existing network at regulated, cost-based rates. In this way, a competitive LEC may more easily and less expensively begin to establish its market presence.

However, before an incumbent LEC is obligated to lease network elements on an unbundled basis, the Federal Communications Commission ("FCC") must find that a refusal to deal would "impair" competition. Section 251(d)(2) requires the FCC to determine which network elements incumbent LECs must offer to a competitive LEC on an unbundled basis. 47 U.S.C. § 251(d)(2).

Once the FCC determines that a particular network element must be offered on an unbundled basis, a competitive LEC that wishes to lease the network element must negotiate with the incumbent LEC to determine price and other terms. 47 U.S.C. § 251(c)(1). If the negotiations come to an impasse or otherwise fail to produce and agreement, the parties must submit the dispute to binding arbitration.[4] The arbitrator's decision is subject to approval by the relevant state regulatory commission, usually the state public utilities commission. *Id.* If the parties have failed to agree on the lease price, the state regulatory

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[4] As the Seventh Circuit has noted, the "arbitration" is really the first stage in a regulatory proceeding, for it bears none of the traditional hallmarks of normal arbitration such as voluntary consent and finality. *See Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069, 1070 (7th Cir.2008) ("*Box I*").

commission may set a price that is "just and reasonable." *Id.* § 252(d)(1).

These "just and reasonable" rates must be based upon the Total Element Long Run Incremental Cost ("TELRIC") methodology. 47 C.F.R. § 51.505. The TELRIC methodology is based on what it cost the incumbent LEC to acquire the network elements; this historical cost method often results in prices that, under certain circumstances, can be highly favorable to the competitive LECs. *See Verizon Communications*, 535 U.S. at 489, 496-97, 122 S.Ct. 1646 (upholding 47 C.F.R. § 51.505); *Box II*, 548 F.3d at 609.

The FCC's attempts to implement the incumbent LEC's unbundling obligations have a long history. The first three published rules were invalidated by the courts, in part,[5] and it was not until the FCC issued the Triennial Review Remand Order in 2005 (the "TRRO"), Order on Remand, *In the Matter of Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (Feb. 4, 2005), that the FCC's rules survived judicial review, *see Covad Comms. Co. v. FCC*, 450 F.3d 528 (D.C.Cir.2006). Two predecessor orders, the relevant parts of which were not invalidated by courts, are relevant to our analysis and are discussed in greater detail below: the 2003 Triennial Review Order (the

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[5] *See Covad Comms. Co. v. FCC*, 450 F.3d 528, 533-534 (D.C.Cir.2006) (describing history of invalidated FCC unbundling orders).

"TRO"),[6] and the 1996 Local Competition Order (the "LCO").[7]

B. Procedural History

After the FCC issued the TRRO, AT & T – the incumbent LEC in California – sought to negotiate changes to its agreements with competitive LECs to bring their contracts into conformity with AT & T's now-changed obligations. After negotiations broke down, AT & T brought a consolidated arbitration proceeding before the California Public Utilities Commission ("CPUC"). CPUC issued a decision favoring the competitive LECs on several disputed issues, and AT & T filed an action in federal district court seeking to set aside four of CPUC's orders related to unbundling. Two of these orders are at issue on appeal:

1. *Entrance Facilities* – CPUC ordered AT & T to lease entrance facilities to competitor LECs at TELRIC rates for the purpose of interconnection. An entrance facility is a "dedicated transport" (a wire) that connects one LEC's "switch" (a computer that routes calls) to another LEC's switch. In other words, an entrance facility is the high capacity wire that links telephone networks. Entrance facilities may be used for two distinct purposes. First, a competitive LEC can use an entrance facility for interconnection – that is, to link the competitive LEC's

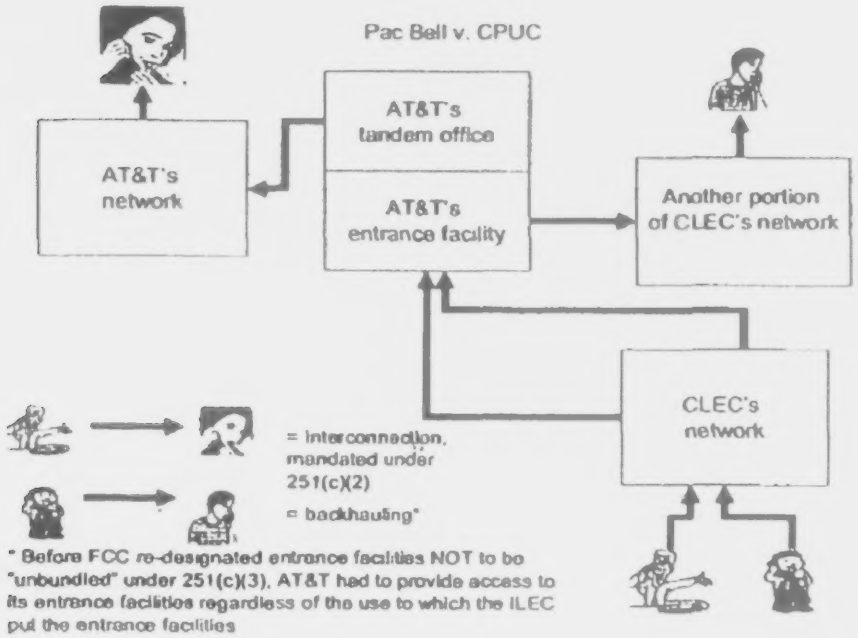
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[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16978 (2003), *vacated in part by United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C.Cir.2004).

[7] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996) (subsequent history omitted).

network with that of the incumbent LEC so that the competitive LEC's customers may reach the incumbent LEC's customers. *See* TRRO ¶ 138-40; TRO ¶ 366-67.

Second, a competitive LEC can use an entrance facility for what the industry calls "backhauling." In the case of backhauling, the competitive LEC uses the entrance facility to permit its *own* customers to reach *one another* over the incumbent LECs network. *See id.*[8] The following diagram illustrates the difference between interconnection and backhauling:



[8] Incumbent LECs are capable of screening out calls that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a customer of the competitive LEC, the computer can screen out the call.

Under the TRRO, incumbent LECs are not obligated to offer entrance facilities on an unbundled basis under 47 U.S.C. § 251(c)(3). AT & T and the competitive LECs disputed, however, whether § 251(c)(2) obligates incumbent LECs to lease their entrance facilities to competitive LECs at TELRIC rates for the purposes of "interconnection" (*i.e.*, for the purpose of allowing competitive LEC customers to place calls to incumbent LEC customers). CPUC concluded that § 251(c)(2) requires incumbent LECs to lease entrance facilities to competitive LECs at TELRIC rates for interconnection. On cross motions for summary judgment, the district court confirmed CPUC's arbitral order on this point, and AT & T timely appealed.

2. *DS1 Transport* – CPUC also ruled that the DS1 Cap Rule applies only on routes where competitive LECs are not "impaired"[9] as to DS3 transport circuits. A "transport circuit" is a wire that carries telecommunications signals along "routes" between switching centers (computers that direct calls to other locations). TRRO ¶ 67. Transport circuits come in two grades relevant here: DS1 (low capacity) and DS3 (high capacity). A DS3 line can carry twenty-four times as many calls as a DS1 line but is more expensive to buy and install than DS1 lines. TRRO ¶ 129 n.361. All parties agree that the FCC's rules

[9] According to FCC regulations, a competitive LEC's ability to provide service is "'impaired' if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a reasonably efficient competitor uneconomic." 47 C.F.R. § 51.317(b).

cap the number of DS1 circuits competitive LECs may lease from incumbent LECs on an unbundled basis along routes where competitive LECs are not "impaired" as to higher capacity DS3 lines. Once a competitive LEC has sufficient traffic to justify leasing ten or more DS1 lines, it is economical for the competitive LEC to build, deploy, and install its own DS3 line. TRRO ¶¶ 71-73.

However, AT & T and the competitive LECs disputed whether this cap also applies to routes where the FCC had concluded that competitive LECs were "impaired" as to higher capacity DS3 lines. CPUC ruled in favor of the competitive LECs, and held that the cap did not apply along such "DS3-impaired" routes. The district court disagreed, concluding that, under the plain language of the FCC's rule, the DS1 Cap applies along all routes, and vacated the arbitral order on this point. Cbeyond filed a motion in the district court to join the action as an intervenor for the purpose of appeal.

ANALYSIS

This court reviews *de novo* claims of error in a district court's order determining whether an arbitrator's decision complies with FCC regulations. *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1150 (9th Cir.2006). This court owes no deference to the arbitrator's decision. *Id.* The parties may not challenge the validity of any final order of the FCC, including FCC regulations, in this action. 28 U.S.C. § 2342.[10]

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[10] Under the Hobbs Act, this court lacks jurisdiction to rule on a collateral attack of an FCC order. 28 U.S.C. § 2342; *see also U.S. West Comms., Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir.2002) ("Properly promulgated FCC regulations currently in effect must be presumed valid for the purposes of this appeal. The Hobbs Act, 28 U.S.C. § 2342, requires that all chal-

A. Access to Entrance Facilities Under 47 U.S.C. § 251(c)(2).

AT & T contends the district court erred by affirming the CPUC's arbitral order permitting competitive LECs to lease entrance facilities from incumbent LECs under 47 U.S.C. § 251(c)(2), the interconnection provision. Both the Seventh and the Eighth circuits recently rejected AT & T's position, and have concluded that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection. *See Sw. Bell Tel., LP v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir.2008) ("*SWBT*"); *Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir.2008) ("*Box I*");[11] *contra Michigan Bell Tel. Co. v. Lark*, 597 F.3d 370 (6th Cir.2010). For the reasons that follow, we agree with the Seventh and Eighth Circuits and reject the rea-

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lenges to the validity of final orders of the FCC be brought by original petition in a court of appeals. The district court thus lacked jurisdiction to pass on the validity of the FCC regulations, and no question as to their validity can be before us in this appeal."); *see also GTE S., Inc. v. Morrison*, 199 F.3d 733, 742-43 (4th Cir.1999) (holding the court lacked jurisdiction to rule on the validity of FCC rules "including those relating to rulemaking" on review of district court order affirming state public utility's arbitral decision relating to provisions of the Act).

[11] In *Box I*, the Seventh Circuit held that because entrance facilities were a "technologically feasible" means of handing off traffic between a competitive LEC and an incumbent LEC, an obligation to lease such facilities at TELRIC rates was within the scope of § 251(c)(2) and the implementing regulations. 526 F.3d at 1071-72. The Eighth Circuit reached the same conclusion in *SWBT*, 530 F.3d at 683-84. In *SWBT*, the Eighth Circuit stated: "If a [competitive] LEC needs entrance facilities to interconnect with an [incumbent] LEC's network, it has the right to obtain such facilities from the [incumbent] LEC." *Id.* at 684.

soning advanced by AT & T and the Sixth Circuit in its recent 2-1 decision.

Section 251(c)(2) provides that "each incumbent local exchange carrier has the . . . duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." 47 U.S.C. § 251(c)(2). The FCC defines interconnection as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. In other words, interconnection provides a way for a competitive LEC's customers to reach AT & T's customers and vice versa. Section 251(c)(2)(B) specifies that incumbent LECs must offer competitive LECs such interconnection "at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2)(B). The FCC regulation also states that incumbent LECs must provide competitive LECs with "any technically feasible method of obtaining interconnection." 47 C.F.R. § 51.321(a).

The FCC calls entrance facilities "the transmission facilities that connect competitive LEC networks with incumbent LEC networks." TRRO ¶ 136. As the term "entrance" implies, entrance facilities provide a way for a competitive LEC's calls to enter AT & T's network and reach AT & T customers, a fact that AT & T concedes. For the competitive LECs to use the entrance facilities this way is interconnection.[12]

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[12] AT & T seeks to distinguish the historical use of entrance facilities for interconnection by long distance service providers, which did not compete with AT & T, and the current use by competitive LECs, which do compete with AT & T. AT & T states that "entrance facilities in this case provides the same function" as entrance facilities did historically (*i.e.*, connecting

That AT & T's entrance facilities can be used for a purpose besides interconnection (i.e., backhauling) does not change the result that 47 U.S.C. § 251(c)(2) mandates AT & T to provide competitive LECs access at regulated rates to its entrance facilities for *interconnection*. The parties disagree about the effect on this result of the FCC's finding in its TRRO that under a different subsection of the Act, § 251(c)(*3*),[13] competitive LECs are not impaired[14] in building

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networks), but competitive LECs can feasibly interconnect with AT & T at a different point in AT & T's network, whereas the long distance providers could not. This contention does not survive the plain language of § 251(c)(2)(B), which requires an incumbent LEC to provide interconnection "at *any* technically feasible point within [its] network." (Emphasis added.)

[13] Section 251(c)(3) provides that incumbent LECs have "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

[14] The Act tasks the FCC with deciding whether a particular network element, i.e., "a facility or equipment used in the provision of a telecommunications service," 47 U.S.C. § 153(29), is one that incumbent LECs must lease to competitive LECs at regulated rates, i.e., the element is "unbundled" under 47 U.S.C. § 251(c)(3). 47 U.S.C. § 251(d). To make that determination, the FCC must consider, at a minimum, two factors: "whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* The FCC thus makes an "impair-

entrance facilities and therefore that entrance facilities are not "unbundled network elements" that incumbent LECs like AT & T have a duty to provide competitive LECs *for any purpose*, including backhauling. TRRO ¶¶ 136-141.

As an initial matter, under general principles of statutory interpretation, the specific duty found in 47 U.S.C. § 251(c)(2) of providing interconnection facilities prevails over the general duty of providing network elements at unbundled rates, found in § 251(c)(3) (regardless whether that general unbundling duty exists as to entrance facilities). *See NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir.1994) ("It is a well-settled canon of statutory interpretation that specific provisions prevail over general provisions.").

Moreover, as the district court found, the TRRO reinforces that the duties of incumbent LECs under 47 U.S.C. § 251(c)(2) and § 251(c)(3) are independent. The TRRO states that the FCC's finding that incumbent LECs need not lease entrance facilities as unbundled network elements under (c)(3) "does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." TRRO ¶ 140.

AT & T contends TRRO Paragraph 140 does not require incumbent LECs to offer entrance facilities at TELRIC rates because the TRRO uses the term "interconnection facilities" instead of "entrance facilities" when it refers to the right under 47 U.S.C. § 251(c)(2) that is not altered by the TRRO's determination that "entrance facilities" need not be un-

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ment finding" as to that network element. *See Covad Comms.*, 450 F.3d at 534-45.

bundled under § 251(c)(3). First, although the FCC did not use the term "entrance facilities" in Paragraph 140, the paragraph appears in a section of the TRRO entitled "Entrance Facilities," which solely discusses the effect of the FCC's finding as to entrance facilities. Moreover, prior FCC rulings make clear that the interconnection obligation contained in § 251(c)(2) includes a duty to lease entrance facilities at TELRIC rates when such facilities will be used for the purposes of interconnection. The 1996 Local Competition Order ("LCO") broadly defined the interconnection obligation to include a duty to offer unbundled network elements at TELRIC rates:

> We conclude that, under sections 251(c)(2) *and* 251(c)(3), any requesting carrier may choose *any method of technically feasible interconnection* or access to unbundled elements at a particular point. Section 251(c)(2) imposes an interconnection duty at any technically feasible point; *it does not limit that duty* to a specific method of interconnection or *access to unbundled elements*.

LCO ¶ 549 (emphasis added); *see also* 47 C.F.R. § 51.321(a) (stating that incumbent LECs are required to offer "any technically feasible method of obtaining interconnection").

Though the LCO did not expressly state that entrance facilities were one of the "network elements" incumbent LECs were required to make available under 47 U.S.C. § 251(c)(2), the later Triennial Review Order ("TRO") expressly interpreted the LCO to impose this obligation. The TRO stated:

> In reaching [the determination that entrance facilities are not "network elements" subject to the unbundling obligation in § 251(c)(3)] we note that, to the extent that requesting carriers need

> facilities in order to 'interconnect with the incumbent LEC's network,' section 251(c)(2) of the Act *expressly provides for this* and we do not alter the Commission's interpretation of this obligation.

TRO ¶ 365. The TRO elaborated:

> [C]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs [unbundled network elements], including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic.

TRO ¶ 366. The TRO thus expressly interpreted the LCO to allow competitive LECs to lease entrance facilities or "transmission links" at TELRIC rates for the purpose of achieving interconnection. This interpretation of the LCO is reasonable and entitled to

deference.[15] *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation.").[16] Moreover, AT & T's contention that the TRO's interpretation of the LCO conflicts with the terms of 47 U.S.C. § 251(c)(2) is foreclosed because AT & T cannot challenge the validity of FCC orders in this proceeding. *See Jennings*, 304 F.3d at 958 n.2.

AT & T also contends CPUC's interpretation conflicts with the FCC's express findings that competitive LECs are not "impaired" as to entrance facilities. *See* TRRO ¶¶ 138, 139. But those FCC findings also expressly distinguished entrance facilities used for

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[15] Contrary to AT & T's assertion, this portion of the TRO was not vacated in *USTA II*, 359 F.3d 554. *USTA II* vacated only the TRO's conclusion that entrance facilities are categorically excluded from the definition of "network elements" under § 251(c)(3). *Id.* at 585. The court did not rule on the validity of the FCC's conclusion that, under § 251(c)(2), incumbent LECs are obligated to offer entrance facilities at TELRIC rates.

[16] The specific statements in the TRO and the LCO that the obligation to provide facilities and equipment under § 251(c)(2) includes a duty to provide entrance facilities foreclose AT & T's interpretation of the term "interconnection facilities." AT & T relies on 47 C.F.R. § 51.5, which defines "interconnection" to exclude the "transport and termination of traffic." AT & T construes this language to exclude *any* duty under § 251(c)(2) to carry a competitive LEC's traffic. This conflicts with TRRO ¶ 140 itself, which explains that "interconnection facilities" are "for transmission and routing" of telephone calls. If the duty to provide "interconnection" did not include any duty to provide *any* transport of calls, then § 251(c)(2) would be meaningless because incumbents could physically link networks with the competitive LEC, but refuse to carry calls to the incumbent LEC's terminal customers, thus effectively locking the competitive LEC out of the market.

the purpose of interconnection and for backhauling. TRRO ¶¶ 138-140. In light of the different economic considerations associated with the use of entrance facilities for interconnection, on the one hand, and for backhaul, on the other, the FCC could reasonably conclude that different regulations were appropriate. Where a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits – both the originator and the recipient of the call are competitive LEC customers. But when the competitive LEC uses the entrance facility for interconnection, both competitor and incumbent benefit: the incumbent's customers can reach customers of the competitor, and vice versa. *See generally* LCO ¶ 162 ("In this situation . . . each gains value from the interconnection arrangement."); TRO ¶ 367 ("Our conclusion in this respect is buttressed by the fact that the economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC's network that our analysis must adequately reflect this distinction."); *see also Box I*, 526 F.3d at 1071 ("What's the point of specifying that [competitive] LECs cannot demand access to entrance facilities as unbundled network elements, AT & T inquires, if state commissions can turn around and require the same access at the same price anyway? The answer . . . is that [competitive] LECs do not enjoy the "same" access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then, [competitive] LECs could use entrance facilities for both interconnection and backhauling.").

Accordingly, we agree with the district court and hold that, under 47 U.S.C. § 251(c)(2), incumbent LECs must lease entrance facilities at TELRIC rates

to competitive LECs for the purpose of interconnection.

B. Unbundled Access to DS1 Circuits Under 47 U.S.C. § 251(c)(3).

In its cross-appeal, Cbeyond contends the district court erred in vacating the CPUC's order that required incumbent LECs to grant unbundled access to an unlimited number of DS1 transport circuits along routes on which competitive LECs are impaired as to DS3 transport circuits.[17] The district court concluded that the plain language of the governing regulation, 47 C.F.R. § 51.319(e)(2)(ii)(B) (the "DS1 Cap Rule"),[18] limits a competitive LEC to a maximum of ten DS1 circuits along any route regardless whether the competitive LEC is impaired as to DS3 lines. We agree. Under the plain language of the regulation, the DS1 Cap Rule applies to *all* routes where DS1 circuits are available on an unbundled basis.

On appeal, Cbeyond contends the district court's interpretation of the DS1 Cap Rule is contrary to the

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[17] AT & T incorrectly contends Cbeyond waived this issue by failing to raise it in the district court. This issue is (1) a pure question of law; and (2) was fully briefed in the district court by the CPUC. Accordingly, the issue has not been raised for the first time on appeal and this court can reach the issue. Even if the issue was presented for the first time on appeal, the court could reach the question. *See K & N Eng., Inc. v. Bulat*, 510 F.3d 1079, 1081 n.2 (9th Cir.2007) (the court may, in its discretion, reach issues raised for the first time on appeal if the record is fully developed, the question is a pure question of law, and no prejudice will result).

[18] The DS1 Cap Rule provides: "Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis."

FCC's findings in the earlier TRRO. Cbeyond concedes, however, that the language of the DS1 Cap Rule – 47 C.F.R. § 51.319(e)(2)(ii)(B) – unambiguously limits to ten the number of DS1 circuits an incumbent LEC must offer at TELRIC rates on *any* route.

In general, the plain meaning of an administrative regulation controls. *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1084 (9th Cir.2007). Plain meaning, however, is "not the end of the inquiry." *Id.* at 1086; *see also Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir.2007). The plain language of a regulation does not control if "clearly expressed administrative intent is to the contrary or if such plain meaning would lead to absurd results." *Id.* (internal quotation marks and alterations omitted). "[T]he regulatory intent that overcomes plain language must be referenced in the published notices that accompanied the rulemaking process." *Id.* A rule leads to absurd results only if it would be "patently inconceivable" that the agency intended the result. *Id.* at 1098.

Here, there is no "clearly expressed administrative intent" in the published notices that accompanied the DS1 Cap Rule rulemaking process. Further, the DS1 Cap Rule as we read its plain text would not lead to absurd results. It is perfectly conceivable the FCC meant what it said when it limited the number of DS1 circuits that a competitive LEC can lease on routes where the competitive LEC is impaired as to a higher capacity DS3 circuit. Where a competitive LEC is so impaired, it will have access to an incumbent's DS3 circuits on an unbundled basis. Hence, it would be more economical for the competitive LEC to lease a single DS3 line from the incumbent LEC, rather than eleven or more DS1 lines at greater cost. TRRO ¶ 128 ("This is consistent with the pricing effi-

ciencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s."). The FCC expressly found that once a competitive LEC could aggregate sufficient traffic, the DS3 rules should apply: "When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply." *Id.*

It is hardly "patently inconceivable" that the FCC intended the DS1 cap to apply on all routes, even those where competitive LECs are impaired as to DS3 circuits. In such circumstance, the competitive LEC can obtain more economical DS3 circuits, and there is no reason why the FCC would have intended to permit competitive LECs to impose greater costs on incumbent LECs by allowing unlimited leases of DS1 circuits.

Cbeyond's contention that the DS1 Cap Rule conflicts with the terms of 47 U.S.C. § 251(c)(3) is foreclosed because Cbeyond cannot challenge the validity of the FCC orders in this proceeding. *See Jennings*, 304 F.3d at 958 n.2.

Accordingly, we agree with the district court and hold that, under the plain language of the regulation, the DS1 Cap Rule limits to ten the number of DS1 lines an incumbent LEC must lease to a competitive LEC at TELRIC rates on all routes.

CONCLUSION

For the all of the foregoing reasons, we affirm the district court's order confirming in part and vacating in part the CPUC's arbitral order.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-15568 & 08-15716

PACIFIC BELL TELEPHONE COMPANY
D/B/A AT&T CALIFORNIA,
Plaintiff-Appellant,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants-Appellees,

v.

CBEYOND COMMUNICATIONS, LLC,
Defendant-Intervenor-Appellant.

Argued and Submitted Oct. 6, 2009

Filed Mar. 4, 2010

Before: MARY M. SCHROEDER, A. WALLACE TASHIMA and CARLOS T. BEA, Circuit Judges.

BEA, Circuit Judge:

This case involves the balance the Telecommunications Act of 1996 ("the Act") strikes between providing newer competitors access to previously monopolistic telecommunications markets, on the one hand, and encouraging and protecting infrastructure investments of older, incumbent telecommunications providers on the other. We must interpret two provisions of the Act that impose requirements on older, incumbent local exchange carriers ("incumbent

LECs") – like appellant AT & T – to lease certain components of their existing infrastructure to rival newer, competitive carriers ("competitive LECs") – like intervenor Cbeyond.

First, we must determine whether 47 U.S.C. § 251(c)(2) requires an incumbent LEC to lease its "entrance facilities" (wires that connect rival telephone systems) to a competitive LEC at regulated rates when the competitor wishes to use the "entrance facility" to permit its own customers to reach customers of the incumbent LEC.

Second, we must determine whether 47 C.F.R. § 51.319(e)(2)(ii)(B) (the "DS1 Cap Rule"), which limits to ten the number of low-capacity DS1 telephone lines an incumbent LEC must lease to a competitive LEC at regulated (low) rates along certain routes, is a limitation which also applies to any route, regardless whether the competitive LEC is "impaired" as to the alternative to such low-capacity lines: the competitive LEC's own higher-capacity DS3 lines.

Properly to understand the terms used and the regulatory area into which we are about, some background would help.

BACKGROUND

A. The Telecommunications Act of 1996

Prior to 1996, local telephone service generally was provided by a local monopolist who offered services at prices regulated and imposed by a variety of governmental agencies. Such monopolist providers are commonly referred to as "incumbent local exchange carriers" or "incumbent LECs." Congress enacted the Act to deregulate the telecommunications market. *See generally Verizon Comms. Inc. v. FCC*, 535 U.S. 467, 475-76, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002).

But, to facilitate the entry of new participants into these local markets, the Act imposes on incumbent LECs two duties relevant in this case.

Interconnection Duty at Regulated Rates.

First, the Act imposes a duty on incumbent LECs to permit "interconnection." Pursuant to 47 U.S.C. § 251(c)(2),[1] incumbent LECs must allow the competitive LEC to link its network to that of the incumbent LEC, so that customers of the competitive LEC may place calls to customers of the incumbent LEC. Without the ability to link its network to that of the incumbent LEC, the competitive LEC would have little prospect of selling its telephone services, to say nothing of competing for the customers of the incumbent LEC. A local telephone service is of little use if it cannot connect to other local telephone users.

Lease of Network Parts at Regulated Rates.

Second, the Act imposes a duty that incumbent LECs "unbundle"[2] parts of their network. Each such part of the incumbent LEC's network is a "network

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[1] 47 U.S.C. § 251(c)(2) provides that each incumbent LEC has "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network."

[2] "Unbundling" is the process of breaking apart something into smaller parts. An example is taking a bundled computer system and unbundling it into its individual pieces such as the PC unit, monitor, keyboard, and mouse, and then selling each of these items individually. In the context of this case, "unbundling" is the term used to describe the access provided by incumbent LECs so that other service providers (i.e., competitive LECs) can buy or lease portions of the incumbent LECs' network elements, such as interconnection loops, to serve subscribers.

element". Pursuant to 47 U.S.C. § 251(c)(3),[3] incumbent LECs must permit competitive LECs to lease, at regulated cost-based rates, parts of the incumbent's network, such as telephone wires, call exchanges, and routing systems. This provision promotes competition by allowing a competitive LEC to enter the telephone service market without having first to overcome capital barriers to entry, i.e., without having to construct, at high cost, every component necessary to operate a network. *See Ill. Bell Tel. Co. v. Box*, 548 F.3d 607, 609-10 (7th Cir.2008) ("*Box II*"). For example, a competitive LEC might enter a market by providing residential telephone service in two far-flung neighborhoods. Rather than having to lay its own wire to connect the two neighborhoods, the competitive LEC can, under § 251(c)(3), piggyback on the incumbent LEC's pre-existing network at regulated, cost-based rates. In this way, a competitive LEC may more easily and less expensively begin to establish its market presence.

However, before an incumbent LEC is obligated to lease network elements on an unbundled basis, the Federal Communications Commission ("FCC") must find that a refusal to deal would "impair" competi-

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[3] 47 U.S.C. § 251(c)(3) provides that incumbent LECs have: "The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement [negotiated in good faith by the incumbent LEC and competitive LEC pursuant to § 251(c)(1)] and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

tion. Section 251(d)(2) requires the FCC to determine which network elements incumbent LECs must offer to a competitive LEC on an unbundled basis. 47 U.S.C. § 251(d)(2).

Once the FCC determines that a particular network element must be offered on an unbundled basis, a competitive LEC that wishes to lease the network element must negotiate with the incumbent LEC to determine price and other terms. 47 U.S.C. § 251(c)(1). If the negotiations come to an impasse or otherwise fail to produce and agreement, the parties must submit the dispute to binding arbitration.[4] The arbitrator's decision is subject to approval by the relevant state regulatory commission, usually the state public utilities commission. *Id.* If the parties have failed to agree on the lease price, the state regulatory commission may set a price that is "just and reasonable." *Id.* § 252(d)(1).

These "just and reasonable" rates must be based upon the Total Element Long Run Incremental Cost ("TELRIC") methodology. 47 C.F.R. § 51.505. The TELRIC methodology is based on what it cost the incumbent LEC to acquire the network elements; this historical cost method often results in prices that, under certain circumstances, can be highly favorable to the competitive LECs. *See Verizon Communications*, 535 U.S. at 489, 496-97, 122 S.Ct. 1646 (upholding 47 C.F.R. § 51.505); *Box II*, 548 F.3d at 609.

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[4] As the Seventh Circuit has noted, the "arbitration" is really the first stage in a regulatory proceeding, for it bears none of the traditional hallmarks of normal arbitration such as voluntary consent and finality. *See Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069, 1070 (7th Cir.2008) ("*Box I*").

The FCC's attempts to implement the incumbent LEC's unbundling obligations have a long history. The first three published rules were invalidated by the courts, in part,[5] and it was not until the FCC issued the Triennial Review Remand Order in 2005 (the "TRRO"), Order on Remand, *In the Matter of Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (Feb. 4, 2005), that the FCC's rules survived judicial review, *see Covad Comms. Co. v. FCC*, 450 F.3d 528 (D.C.Cir.2006). Two predecessor orders, the relevant parts of which were not invalidated by courts, are relevant to our analysis and are discussed in greater detail below: the 2003 Triennial Review Order (the "TRO"),[6] and the 1996 Local Competition Order (the "LCO").[7]

B. Procedural History

After the FCC issued the TRRO, AT & T – the incumbent LEC in California – sought to negotiate changes to its agreements with competitive LECs to bring their contracts into conformity with AT & T's now-changed obligations. After negotiations broke down, AT & T brought a consolidated arbitration

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[5] *See Covad Comms. Co. v. FCC*, 450 F.3d 528, 533-534 (D.C.Cir.2006) (describing history of invalidated FCC unbundling orders).

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16978 (2003), *vacated in part by United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C.Cir.2004).

[7] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996) (subsequent history omitted).

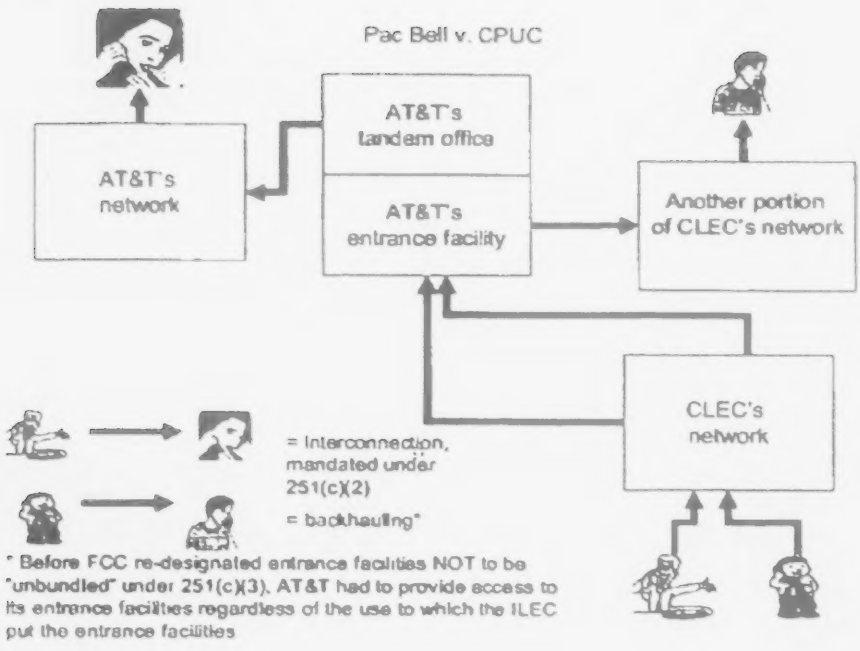
proceeding before the California Public Utilities Commission ("CPUC"). CPUC issued a decision favoring the competitive LECs on several disputed issues, and AT & T filed an action in federal district court seeking to set aside four of CPUC's orders related to unbundling. Two of these orders are at issue on appeal:

1. *Entrance Facilities* – CPUC ordered AT & T to lease entrance facilities to competitor LECs at TELRIC rates for the purpose of interconnection. An entrance facility is a "dedicated transport" (a wire) that connects one LEC's "switch" (a computer that routes calls) to another LEC's switch. In other words, an entrance facility is the high capacity wire that links telephone networks. Entrance facilities may be used for two distinct purposes. First, a competitive LEC can use an entrance facility for interconnection – that is, to link the competitive LEC's network with that of the incumbent LEC so that the competitive LEC's customers may reach the incumbent LEC's customers. *See* TRRO ¶ 138-40; TRO ¶ 366-67.

Second, a competitive LEC can use an entrance facility for what the industry calls "backhauling." In the case of backhauling, the competitive LEC uses the entrance facility to permit its *own* customers to reach *one another* over the incumbent LECs network. *See id.*[8] The following diagram illustrates the difference between interconnection and backhauling:

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[8] Incumbent LECs are capable of screening out calls that would be used for backhauling. A computer identifies the destination of the call, and, if the call is bound for a customer of the competitive LEC, the computer can screen out the call.



Under the TRRO, incumbent LECs are not obligated to offer entrance facilities on an unbundled basis under 47 U.S.C. § 251(c)(*3*). AT & T and the competitive LECs disputed, however, whether § 251(c)(*2*) obligates incumbent LECs to lease their entrance facilities to competitive LECs at TELRIC rates for the purposes of "interconnection" (*i.e.*, for the purpose of allowing competitive LEC customers to place calls to incumbent LEC customers). CPUC concluded that § 251(c)(2) requires incumbent LECs to lease entrance facilities to competitive LECs at TELRIC rates for interconnection. On cross motions for summary judgment, the district court confirmed CPUC's arbitral order on this point, and AT & T timely appealed.

2. *DS1 Transport* – CPUC also ruled that the DS1 Cap Rule applies only on routes where competi-

tive LECs are not "impaired"[9] as to DS3 transport circuits. A "transport circuit" is a wire that carries telecommunications signals along "routes" between switching centers (computers that direct calls to other locations). TRRO ¶ 67. Transport circuits come in two grades relevant here: DS1 (low capacity) and DS3 (high capacity). A DS3 line can carry twenty-four times as many calls as a DS1 line but is more expensive to buy and install than DS1 lines. TRRO ¶ 129 n.361. All parties agree that the FCC's rules cap the number of DS1 circuits competitive LECs may lease from incumbent LECs on an unbundled basis along routes where competitive LECs are not "impaired" as to higher capacity DS3 lines. Once a competitive LEC has sufficient traffic to justify leasing ten or more DS1 lines, it is economical for the competitive LEC to build, deploy, and install its own DS3 line. TRRO ¶¶ 71-73.

However, AT & T and the competitive LECs disputed whether this cap also applies to routes where the FCC had concluded that competitive LECs were "impaired" as to higher capacity DS3 lines. CPUC ruled in favor of the competitive LECs, and held that the cap did not apply along such "DS3-impaired" routes. The district court disagreed, concluding that, under the plain language of the FCC's rule, the DS1 Cap applies along all routes, and vacated the arbitral

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[9] According to FCC regulations, a competitive LEC's ability to provide service is "'impaired' if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a reasonably efficient competitor uneconomic." 47 C.F.R. § 51.317(b).

order on this point. Cbeyond filed a motion in the district court to join the action as an intervenor for the purpose of appeal.

ANALYSIS

This court reviews *de novo* claims of error in a district court's order determining whether an arbitrator's decision complies with FCC regulations. *Verizon Cal., Inc. v. Peevey*, 462 F.3d 1142, 1150 (9th Cir.2006). This court owes no deference to the arbitrator's decision. *Id.* The parties may not challenge the validity of any final order of the FCC, including FCC regulations, in this action. 28 U.S.C. § 2342.[10]

A. Access to Entrance Facilities Under 47 U.S.C. § 251(c)(2).

AT & T contends the district court erred by affirming the CPUC's arbitral order permitting competitive LECs to lease entrance facilities from incumbent LECs under 47 U.S.C. § 251(c)(2), the interconnection provision. Both the Seventh and the Eighth circuits recently rejected AT & T's position, and have

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[10] Under the Hobbs Act, this court lacks jurisdiction to rule on a collateral attack of an FCC order. 28 U.S.C. § 2342; *see also U.S. West Comms., Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir.2002) ("Properly promulgated FCC regulations currently in effect must be presumed valid for the purposes of this appeal. The Hobbs Act, 28 U.S.C. § 2342, requires that all challenges to the validity of final orders of the FCC be brought by original petition in a court of appeals. The district court thus lacked jurisdiction to pass on the validity of the FCC regulations, and no question as to their validity can be before us in this appeal."); *see also GTE S., Inc. v. Morrison*, 199 F.3d 733, 742-43 (4th Cir.1999) (holding the court lacked jurisdiction to rule on the validity of FCC rules "including those relating to rulemaking" on review of district court order affirming state public utility's arbitral decision relating to provisions of the Act).

concluded that FCC regulations authorize state public utilities commissions to order incumbent LECs to lease entrance facilities to competitive LECs at regulated rates for the purpose of interconnection. *See Sw. Bell Tel., LP v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676 (8th Cir.2008) ("*SWBT*"); *Ill. Bell Tel. Co. v. Box*, 526 F.3d 1069 (7th Cir.2008) ("*Box I*").[11] We agree with our sister circuits.

Section 251(c)(2) provides that "each incumbent local exchange carrier has the . . . duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." 47 U.S.C. § 251(c)(2). The FCC defines interconnection as "the linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. In other words, interconnection provides a way for a competitive LEC's customers to reach AT & T's customers and vice versa. Section 251(c)(2)(B) specifies that incumbent LECs must offer competitive LECs such interconnection "at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2)(B). The FCC regulation also states that incumbent LECs must provide competitive LECs with "any technically feasible method of obtaining interconnection." 47 C.F.R. § 51.321(a).

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[11] In *Box I*, the Seventh Circuit held that because entrance facilities were a "technologically feasible" means of handing off traffic between a competitive LEC and an incumbent LEC, an obligation to lease such facilities at TELRIC rates was within the scope of § 251(c)(2) and the implementing regulations. 526 F.3d at 1071-72. The Eighth Circuit reached the same conclusion in *SWBT*, 530 F.3d at 683-84. In *SWBT*, the Eighth Circuit stated: "If a [competitive] LEC needs entrance facilities to interconnect with an [incumbent] LEC's network, it has the right to obtain such facilities from the [incumbent] LEC." *Id.* at 684.

The FCC calls entrance facilities "the transmission facilities that connect competitive LEC networks with incumbent LEC networks." TRRO ¶ 136. As the term "entrance" implies, entrance facilities provide a way for a competitive LEC's calls to enter AT & T's network and reach AT & T customers, a fact that AT & T concedes. For the competitive LECs to use the entrance facilities this way is interconnection.[12]

That AT & T's entrance facilities can be used for a purpose besides interconnection (i.e., backhauling) does not change the result that 47 U.S.C. § 251(c)(2) mandates AT & T to provide competitive LECs access at regulated rates to its entrance facilities for *interconnection*. The parties disagree about the effect on this result of the FCC's finding in its TRRO that under a different subsection of the Act, § 251(c)(*3*),[13]

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[12] AT & T seeks to distinguish the historical use of entrance facilities for interconnection by long distance service providers, which did not compete with AT & T, and the current use by competitive LECs, which do compete with AT & T. AT & T states that "entrance facilities in this case provides the same function" as entrance facilities did historically (*i.e.*, connecting networks), but competitive LECs can feasibly interconnect with AT & T at a different point in AT & T's network, whereas the long distance providers could not. This contention does not survive the plain language of § 251(c)(2)(B), which requires an incumbent LEC to provide interconnection "at *any* technically feasible point within [its] network." (Emphasis added.)

[13] Section 251(c)(3) provides that incumbent LECs have "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network

competitive LECs are not impaired[14] in building entrance facilities and therefore that entrance facilities are not "unbundled network elements" that incumbent LECs like AT & T have a duty to provide competitive LECs *for any purpose*, including backhauling. TRRO ¶¶ 136-141.

As an initial matter, under general principles of statutory interpretation, the specific duty found in 47 U.S.C. § 251(c)(2) of providing interconnection facilities prevails over the general duty of providing network elements at unbundled rates, found in § 251(c)(3) (regardless whether that general unbundling duty exists as to entrance facilities). *See NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir.1994) ("It is a well-settled canon of statutory interpretation that specific provisions prevail over general provisions.").

Moreover, as the district court found, the TRRO reinforces that the duties of incumbent LECs under 47 U.S.C. § 251(c)(2) and § 251(c)(3) are independent.

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elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

[14] The Act tasks the FCC with deciding whether a particular network element, i.e., "a facility or equipment used in the provision of a telecommunications service," 47 U.S.C. § 153(29), is one that incumbent LECs must lease to competitive LECs at regulated rates, i.e., the element is "unbundled" under 47 U.S.C. § 251(c)(3). 47 U.S.C. § 251(d). To make that determination, the FCC must consider, at a minimum, two factors: "whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* The FCC thus makes an "impairment finding" as to that network element. *See Covad Comms.*, 450 F.3d at 534-45.

The TRRO states that the FCC's finding that incumbent LECs need not lease entrance facilities as unbundled network elements under (c)(3) "does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2)." TRRO ¶ 140.

AT & T contends TRRO Paragraph 140 does not require incumbent LECs to offer entrance facilities at TELRIC rates because the TRRO uses the term "interconnection facilities" instead of "entrance facilities" when it refers to the right under 47 U.S.C. § 251(c)(2) that is not altered by the TRRO's determination that "entrance facilities" need not be unbundled under § 251(c)(3). First, although the FCC did not use the term "entrance facilities" in Paragraph 140, the paragraph appears in a section of the TRRO entitled "Entrance Facilities," which solely discusses the effect of the FCC's finding as to entrance facilities. Moreover, prior FCC rulings make clear that the interconnection obligation contained in § 251(c)(2) includes a duty to lease entrance facilities at TELRIC rates when such facilities will be used for the purposes of interconnection. The 1996 Local Competition Order ("LCO") broadly defined the interconnection obligation to include a duty to offer unbundled network elements at TELRIC rates:

> We conclude that, under sections 251(c)(2) *and* 251(c)(3), any requesting carrier may choose *any method of technically feasible interconnection* or access to unbundled elements at a particular point. Section 251(c)(2) imposes an interconnection duty at any technically feasible point; *it does not limit that duty* to a specific method of interconnection or *access to unbundled elements*.

LCO ¶ 549 (emphasis added); *see also* 47 C.F.R. § 51.321(a) (stating that incumbent LECs are required to offer "any technically feasible method of obtaining interconnection").

Though the LCO did not expressly state that entrance facilities were one of the "network elements" incumbent LECs were required to make available under 47 U.S.C. § 251(c)(2), the later Triennial Review Order ("TRO") expressly interpreted the LCO to impose this obligation. The TRO stated:

> In reaching [the determination that entrance facilities are not "network elements" subject to the unbundling obligation in § 251(c)(3)] we note that, to the extent that requesting carriers need facilities in order to 'interconnect with the incumbent LEC's network,' section 251(c)(2) of the Act *expressly provides for this* and we do not alter the Commission's interpretation of this obligation.

TRO ¶ 365. The TRO elaborated:

> [C]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs [unbundled network elements], including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike

> the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection, we find that the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic.

TRO ¶ 366. The TRO thus expressly interpreted the LCO to allow competitive LECs to lease entrance facilities or "transmission links" at TELRIC rates for the purpose of achieving interconnection. This interpretation of the LCO is reasonable and entitled to deference.[15] *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation.").[16] Moreover, AT & T's contention that the

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[15] Contrary to AT & T's assertion, this portion of the TRO was not vacated in *USTA II*, 359 F.3d 554. *USTA II* vacated only the TRO's conclusion that entrance facilities are categorically excluded from the definition of "network elements" under § 251(c)(3). *Id.* at 585. The court did not rule on the validity of the FCC's conclusion that, under § 251(c)(2), incumbent LECs are obligated to offer entrance facilities at TELRIC rates.

[16] The specific statements in the TRO and the LCO that the obligation to provide facilities and equipment under § 251(c)(2) includes a duty to provide entrance facilities foreclose AT & T's interpretation of the term "interconnection facilities." AT & T relies on 47 C.F.R. § 51.5, which defines "interconnection" to exclude the "transport and termination of traffic." AT & T construes this language to exclude *any* duty under § 251(c)(2) to carry a competitive LEC's traffic. This conflicts with TRRO ¶ 140 itself, which explains that "interconnection facilities" are "for transmission and routing" of telephone calls. If the duty to provide "interconnection" did not include any duty to provide *any* transport of calls, then § 251(c)(2) would be meaningless because incumbents could physically link networks with the competitive LEC, but refuse to carry calls to the incumbent

TRO's interpretation of the LCO conflicts with the terms of 47 U.S.C. § 251(c)(2) is foreclosed because AT & T cannot challenge the validity of FCC orders in this proceeding. *See Jennings*, 304 F.3d at 958 n.2.

AT & T also contends CPUC's interpretation conflicts with the FCC's express findings that competitive LECs are not "impaired" as to entrance facilities. *See* TRRO ¶¶ 138, 139. But those FCC findings also expressly distinguished entrance facilities used for the purpose of interconnection and for backhauling. TRRO ¶¶ 138-140. In light of the different economic considerations associated with the use of entrance facilities for interconnection, on the one hand, and for backhaul, on the other, the FCC could reasonably conclude that different regulations were appropriate. Where a competitive LEC uses an interconnection facility for backhaul, only the competitive LEC benefits – both the originator and the recipient of the call are competitive LEC customers. But when the competitive LEC uses the entrance facility for interconnection, both competitor and incumbent benefit: the incumbent's customers can reach customers of the competitor, and vice versa. *See generally* LCO ¶ 162 ("In this situation . . . each gains value from the interconnection arrangement."); TRO ¶ 367 ("Our conclusion in this respect is buttressed by the fact that the economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC's network that our analysis must adequately reflect this distinction."); *see also Box I*, 526 F.3d at 1071 ("What's the point of specifying that [competitive] LECs cannot

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LEC's terminal customers, thus effectively locking the competitive LEC out of the market.

demand access to entrance facilities as unbundled network elements, AT & T inquires, if state commissions can turn around and require the same access at the same price anyway? The answer . . . is that [competitive] LECs do not enjoy the "same" access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then, [competitive] LECs could use entrance facilities for both interconnection and backhauling.").

Accordingly, we agree with the district court and hold that, under 47 U.S.C. § 251(c)(2), incumbent LECs must lease entrance facilities at TELRIC rates to competitive LECs for the purpose of interconnection.

B. Unbundled Access to DS1 Circuits Under 47 U.S.C. § 251(c)(3).

In its cross-appeal, Cbeyond contends the district court erred in vacating the CPUC's order that required incumbent LECs to grant unbundled access to an unlimited number of DS1 transport circuits along routes on which competitive LECs are impaired as to DS3 transport circuits.[17] The district court concluded that the plain language of the governing regulation, 47 C.F.R. § 51.319(e)(2)(ii)(B) (the "DS1 Cap

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[17] AT & T incorrectly contends Cbeyond waived this issue by failing to raise it in the district court. This issue is (1) a pure question of law; and (2) was fully briefed in the district court by the CPUC. Accordingly, the issue has not been raised for the first time on appeal and this court can reach the issue. Even if the issue was presented for the first time on appeal, the court could reach the question. *See K & N Eng., Inc. v. Bulat*, 510 F.3d 1079, 1081 n.2 (9th Cir.2007) (the court may, in its discretion, reach issues raised for the first time on appeal if the record is fully developed, the question is a pure question of law, and no prejudice will result).

Rule"),[18] limits a competitive LEC to a maximum of ten DS1 circuits along any route regardless whether the competitive LEC is impaired as to DS3 lines. We agree. Under the plain language of the regulation, the DS1 Cap Rule applies to *all* routes where DS1 circuits are available on an unbundled basis.

On appeal, Cbeyond contends the district court's interpretation of the DS1 Cap Rule is contrary to the FCC's findings in the earlier TRRO. Cbeyond concedes, however, that the language of the DS1 Cap Rule – 47 C.F.R. § 51.319(e)(2)(ii)(B) – unambiguously limits to ten the number of DS1 circuits an incumbent LEC must offer at TELRIC rates on *any* route.

In general, the plain meaning of an administrative regulation controls. *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1084 (9th Cir.2007). Plain meaning, however, is "not the end of the inquiry." *Id.* at 1086; *see also Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir.2007). The plain language of a regulation does not control if "clearly expressed administrative intent is to the contrary or if such plain meaning would lead to absurd results." *Id.* (internal quotation marks and alterations omitted). "[T]he regulatory intent that overcomes plain language must be referenced in the published notices that accompanied the rulemaking process." *Id.* A rule leads to absurd results only if it would be "patently inconceivable" that the agency intended the result. *Id.* at 1098.

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[18] The DS1 Cap Rule provides: "Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis."

Here, there is no "clearly expressed administrative intent" in the published notices that accompanied the DS1 Cap Rule rulemaking process. Further, the DS1 Cap Rule as we read its plain text would not lead to absurd results. It is perfectly conceivable the FCC meant what it said when it limited the number of DS1 circuits that a competitive LEC can lease on routes where the competitive LEC is impaired as to a higher capacity DS3 circuit. Where a competitive LEC is so impaired, it will have access to an incumbent's DS3 circuits on an unbundled basis. Hence, it would be more economical for the competitive LEC to lease a single DS3 line from the incumbent LEC, rather than eleven or more DS1 lines at greater cost. TRRO ¶ 128 ("This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s."). The FCC expressly found that once a competitive LEC could aggregate sufficient traffic, the DS3 rules should apply: "When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply." *Id.*

It is hardly "patently inconceivable" that the FCC intended the DS1 cap to apply on all routes, even those where competitive LECs are impaired as to DS3 circuits. In such circumstance, the competitive LEC can obtain more economical DS3 circuits, and there is no reason why the FCC would have intended to permit competitive LECs to impose greater costs on incumbent LECs by allowing unlimited leases of DS1 circuits.

Cbeyond's contention that the DS1 Cap Rule conflicts with the terms of 47 U.S.C. § 251(c)(3) is foreclosed because Cbeyond cannot challenge the validity of the FCC orders in this proceeding. *See Jennings*, 304 F.3d at 958 n.2.

Accordingly, we agree with the district court and hold that, under the plain language of the regulation, the DS1 Cap Rule limits to ten the number of DS1 lines an incumbent LEC must lease to a competitive LEC at TELRIC rates on all routes.

CONCLUSION

For the all of the foregoing reasons, we affirm the district court's order confirming in part and vacating in part the CPUC's arbitral order.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 07-1797 SI

PACIFIC BELL TELEPHONE COMPANY
D/B/A AT&T CALIFORNIA, A CALIFORNIA CORPORATION,
Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants.

Feb. 21, 2008

ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

On November 16, 2007, the Court heard argument on the parties' cross-motions for summary judgment. The Court GRANTS in part and DENIES in part the motion filed by AT&T, and GRANTS in part and DENIES in part the motion filed by the CPUC defendants. As explained below, the Court holds that the CPUC exceeded its jurisdiction when it set rates for the UNE-P after March 11, 2006, and that the CPUC misapplied the FCC's DS1 transport rule. The Court also concludes that the CPUC's notice and grandfathering rules violate the filed-tariff doctrine. However, the Court holds that the CPUC properly ruled that CLECs are entitled to access ILECs' entrance facilities at TELRIC rates when needed for interconnection.

BACKGROUND

1. Regulatory framework/Telco Act of 1996

The Telecommunications Act of 1996 ("Telco Act" or the "Act"), 47 U.S.C. § 251 *et seq.*, seeks to promote competition in the nation's telecommunications system by opening up traditionally monopolistic local exchange networks to new competitors. Prior to the Act's passage, local telephone services were provided by local exchange carriers who were usually issued exclusive geographic franchises by state licensing authorities. Each incumbent local exchange carrier ("ILEC") operated its own local telephone network.

Relevant here, Section 251 of the Act imposes three specific requirements on incumbents to foster competition: (1) interconnection-incumbents must allow competitive local exchange carriers ("CLECs") to interconnect with the incumbents' local exchange networks at fair, nondiscriminatory rates; (2) lease of unbundled network elements ("UNEs")[1]-incumbents must allow competitors to lease parts of the incumbents' networks at fair, nondiscriminatory rates; and (3) resale-incumbents must allow competitors to pur-

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[1] "Unbundled" refers to one of three ways that a CLEC can acquire access to incumbent carriers' facilities. When passing the 1996 Act, Congress established three paths of entry for CLECs seeking to compete with incumbent carriers in the local market. A CLEC can (i) construct and deploy its own facilities and then "interconnect" them with the incumbent's network so that customers of the two carriers can call each other, 47 U.S.C. § 251(c)(2); (ii) purchase the incumbent's finished retail services at a large discount and then resell them to its own customers, *id.* at § 251(c)(4); or (iii) lease qualifying elements of the incumbent's network on an "unbundled" basis (i.e., as a stand-alone offering rather than as part of a complete service) and then use those elements, in combination with other facilities, to provide a finished service, *id.* at § 251(c)(3).

chase telephone services at wholesale rates for resale to the competitors' customers. The rates that ILECs may charge for access to UNEs must be based on "cost," 47 U.S.C. § 252(d)(1), and the FCC has implemented this "cost" standard by requiring state commissions to adopt the Total Element Long-Run Incremental Cost ("TELRIC") methodology, a rate-setting methodology that sets rates attractive to CLECs.

Section 252 of the Act sets forth the "Procedures for Negotiation, Arbitration, and Approval of Agreements" that parties must follow when a competing carrier wishes to enter the local telecommunications market. Pursuant to this section, if a competing carrier so requests, an incumbent must enter into negotiations to arrive at an interconnection agreement under which the competitor is provided access to the incumbent's network and services. If parties are unable to agree on the terms of an interconnection agreement, the parties are required to submit to mediation and/or compulsory arbitration. When parties submit to compulsory arbitration, as the parties in this case did, the state Public Utility Commissions ("PUCs") are charged with resolving "any open issues and imposing conditions upon the parties to the agreement . . . that meet the requirements of section 251 . . . including the regulations prescribed by the Commission pursuant to section 251 . . . ." 47 U.S.C. § 252(c)(1). The state PUCs must approve all interconnection agreements in order for the agreements to be effective. When reviewing arbitrated agreements, the state PUCs are instructed to ensure that the agreement complies with section 251 and the FCC regulations promulgated thereunder. Section 252(e)(6) further provides that "[i]n any case in

which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6).

2. *TRRO*

On February 4, 2005, the FCC released the *Triennial Review Remand Order* ("*TRRO*"), Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (2005), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C.Cir.2006). The *TRRO* is relevant here in three respects. First, the *TRRO* imposed a "nationwide bar" on unbundled access to the "UNE-Platform," or "UNE-P," which consists of all the loop, switching and transport facilities necessary to provide local telephone service, in pre-combined form. The FCC explained,

> We reexamine incumbent LECs' obligations to unbundle mass market local circuit switching in light of the D.C. Circuit's vacatur of our previous rules.[2] In particular, we have revised our approach to impairment pursuant to *USTA II*'s

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[2] On three occasions from 1996 through 2003, the FCC issued orders that imposed what the Supreme Court has termed "blanket" unbundling. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). These orders required ILECs to allow CLECs access, at TELRIC rates, to the UNE-P. Each time the FCC imposed the blanket unbundling requirement, the FCC orders were vacated as inconsistent with the 1996 Act. *See Iowa Utils. Bd.*, 525 U.S. at 388-91; *U.S. Telecom Ass'n v. FCC* ("*USTA*"), 290 F.3d 415 (D.C.Cir.2002); *U.S. Telecom Ass'n v. FCC* ("*USTA II*"), 359 F.3d 554 (D.C.Cir.2004).

instruction to draw appropriate inferences about potential competition in one market from evidence of competitive deployment in another market. Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide. We conclude, based on the record here, and the reasonable inferences we draw from it, that competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets. . . . We find that these factors substantially mitigate the Triennial Review Order's stated concerns about circuit switching impairment. Moreover, regardless of any limited potential impairment requesting carriers may still face, we find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore we conclude not to unbundle pursuant to section 251(d)(2)'s "at a minimum" authority. Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntari-

> ly have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.

TRRO, Mass Market Local Circuit Switching, Summary, ¶ 199.

Second, the *TRRO* held that CLECs may not obtain unbundled access to "entrance facilities," which are dedicated transport facilities that connect CLEC switches to the ILEC's network. The FCC found that CLECs were not impaired in their ability to compete without unbundled access to these facilities because "entrance facilities are less costly to build, are more widely available from alternative providers, and have greater revenue potential than dedicated transport between incumbent LEC central offices," and because "competitive LECs are increasingly relying on competitively provided entrance facilities." *Id.* ¶¶ 138-39. The FCC also noted, however, that "our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to Section 252(c)(2) for the transmission and routing of telephone and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." *Id.* ¶ 140.

Third, the *TRRO* discussed a limitation on the number of lower capacity DS1[3] transport circuits a CLEC can obtain as UNEs. The *TRRO* states,

> *Limitation on DS1 Transport.* On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits. This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.

Id. ¶ 128 (footnote omitted). After this order, the FCC issued a rule limiting to 10 the number of DS1 transport facilities that CLECs may obtain on any transport route: "A requesting telecommunications carrier may obtain a maximum of 10 unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis." 47 C.F.R. § 51.319(e)(2)(ii)(B) (effective March 11, 2005). Thus, the FCC rule applies the 10 DS1 facility limitation more broadly than had the

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[3] DS1 and DS3 transport circuits are transport facilities dedicated to a particular carrier for transmission between ILEC wire centers. A DS1 has 24 "channels" and therefore can carry 24 calls simultaneously, while a DS3 has 28 times that capacity. *See Local Competition Order*, 11 F.C.C.R. 15499 (Aug. 8, 1996) (hereafter "*TRO*" ¶ 202 n.633-34).

TRRO, and one of the issues here is the apparent discrepancy between the *TRRO* and the FCC rule.

3. CPUC rulings

After the *TRRO*, AT&T sought to negotiate changes to its existing interconnection agreements, but AT&T was unable to reach agreement with all CLECs. AT&T initiated a consolidated arbitration that would result in an amendment incorporating the FCC's new rules. The PUC issued its original decision on January 26, 2006, and an order granting limited rehearing on January 11, 2007. AT&T challenges four of the CPUC's rulings: (1) the CPUC set a discounted retail rate – the "Total Service Retail" or "TSR" rate[4] – rather than "market" rates, for UNE-P lines that did not transition to alternative serving arrangements by the FCC-mandated March 11, 2006 deadline; (2) the CPUC required AT&T to provide CLECs with access to entrance facilities for interconnection at TELRIC rates; (3) the CPUC confined the FCC's 10-circuit limit on the number of DS1 transport circuits a CLEC can obtain as UNEs to routes where higher-capacity DS3 circuits are not available as UNEs; and (4) the CPUC required AT&T to provide 60-days notice of certain proposed changes in its federal and state access tariffs, and required AT&T to grandfather state special access tariff offerings under certain circumstances.[5]

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[4] According to the CPUC, the TSR is set at 17% less than AT&T's retail rates. RE 2400-01.

[5] AT&T appears to have abandoned its challenge to the CPUC's ruling requiring AT&T to waive nonrecurring charges for post-deadline UNE transitions involving no physical work.

STANDARD OF REVIEW

This Court considers *de novo* whether the CPUC's rulings are in compliance with the Telco Act and the implementing regulations, and considers all other issues under an arbitrary and capricious standard. *See U.S. West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir.1999).

DISCUSSION

1. Rate for UNEP-lines

The CPUC ruled that UNE-P lines that had not transitioned to "alternative serving arrangements" by the March 11, 2006 deadline should be re-priced to "Total Service Resale" rates. Before the CPUC, AT&T argued that it should be allowed to charge "market-based" rates after the March 11, 2006 deadline. The CPUC adopted the TSR rates, which had previously been approved by the Commission, because "adopting SBC's market based rates would be unduly punitive for failure to make the deadline to transition services from ULS/UNE-P arrangements." RE 1921. On rehearing, the CPUC reaffirmed its decision,

> We are persuaded that the rate for CLECs unable to complete the submission of transition orders by the deadline should be at TSR rates. To adopt market rates without an evidentiary record would violate Public Utilities Code Section 1705, which requires separately stated findings of fact and conclusions of law on all issues material to the decision. Without a record, the Commission would have no basis for finding that the rates are "just and reasonable," as required by Public Utilities Code Section 451 and § 201(b) of the Communications Act of 1934. In contrast, the TSR rates were established after a broad

> rulemaking and investigation that included hearings.

RE 2400. AT&T contends that the CPUC exceeded its authority when it set rates for UNE-P lines because, after *TRRO*, UNE-P lines were no longer required to be unbundled under Section 251.

As an initial matter, the CPUC suggests that AT&T waived its right to challenge the CPUC's authority because AT&T and the CLECs submitted the matter of what rate should apply to UNE-P lines as an "open issue" in arbitration. The CPUC argues that AT&T is trying to "have it both ways" by first submitting the matter to arbitration and now challenging the CPUC's jurisdiction. The Court disagrees. The CPUC does not cite any authority for the proposition that a party can waive the jurisdictional arguments raised by AT&T. Moreover, although AT&T did not frame its jurisdictional arguments as directly in the proceedings below, AT&T did assert that the matter was beyond the CPUC's authority, *see* RE 2000 (AT&T's brief on rehearing); RE 2016 n.11 (AT&T comments on draft ALJ decision), and repeatedly argued that market rates should apply to UNE-P lines after March 11, 2006, because after that date UNE-P lines were no longer governed by Section 251, *see* RE 1370 (AT&T's initial brief to arbitrator). Accordingly, the Court finds that AT&T is not foreclosed from arguing that the CPUC acted beyond its authority in establishing rates for UNE-P lines after those lines were no longer subject to the unbundling requirements of Section 251.

Turning to the merits of AT&T's arguments, AT&T contends that the CPUC exceeded its authority in setting rates for UNE-P lines after March 11, 2006 because the PUC's authority to resolve "open

issues" is confined to matters that arise "pursuant to Section 251." 47 U.S.C. § 252(a)(1), (b)(1). Section 252 of the Telco Act authorizes the CPUC to resolve "open issues" that remain after the parties negotiate "a request for interconnection, services or network elements *pursuant to Section 251*." 47 U.S.C. § 252(a) (1), (b)(1) (emphasis added). Section 252 further provides that state commissions must "ensure that such resolution . . . meet[s] the requirements of Section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title." *Id.* § 252(c)(1). AT&T argues that the CPUC is only authorized to set rates "for purposes of" Section 251, and that as a result of the *TRRO*, UNE-P was no longer available pursuant to Section 251.

The CPUC does not address AT&T's statutory arguments. Instead, the CPUC generally asserts that it acted consistently with the Telco Act because the TSR rate is a just and reasonable rate intended to foster competition. The CPUC contends that because there is no true telecommunications market, there is no true "market rate" for UNE-P lines, and if AT&T were permitted to charge a "market rate," such a rate would be "whatever AT&T wants to charge," and would be unduly punitive and anticompetitive. The CPUC notes that other state commissions have applied a resale rate (similar to the TSR) to untransitioned UNE-P arrangements or ordered conversion of such lines to the equivalent resold services. The CPUC also argues that the FCC simply failed to address what would happen after the March 11, 2006 deadline, and that the *TRRO*'s silence on the issue does not mean that the state commissions have no

authority to act with regard to un-transitioned UNE-P arrangements after March 11, 2006.

The Court concludes that the CPUC exceeded its authority by establishing rates for UNE-P after the March 11, 2006 deadline set by the FCC. Whether the rate the CPUC selected is just and reasonable is irrelevant to the analysis of whether the CPUC had the authority to set the rate in the first place. There is no dispute that the *TRRO* required CLECs to transition their base of embedded UNE-P lines to alternative arrangements by March 11, 2006, and that after that date ILECs were no longer required to provide UNE-P on an unbundled basis. In the *TRRO*, the FCC emphasized that the 12 month transition period was intended to provide CLECs sufficient time to fully transition the embedded base of UNE-P customers:

> *Because unbundled local circuit switching will no longer be made available pursuant to section 251(c)(3)*, we establish a transition plan to migrate the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement. In particular, eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors.
>
> We require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of this Order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrange-

> ments using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order. The transition we adopt is based on the incumbent LECs' asserted ability to convert the embedded base of UNE-P customers to UNE-L on a timely basis while continuing to meet hot cut demand for new UNE-L customers. We believe it is appropriate to adopt a longer, twelve-month, transition period than was proposed in the Interim Order and NPRM. We believe that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions. Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. *By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements.*

TRRO, ¶¶ 226-27 (emphasis added, footnotes omitted).

As the above language makes clear, the FCC established a transition period during which CLECs would transition their embedded UNE-P customers, and after which ILECs would no longer be required to provide UNE-P on an unbundled basis. The FCC repeatedly emphasized that it was imposing a "nationwide bar" on mandatory access to the UNE-P under Section 251. Because ILECs were not required under

Section 251 to provide access to the UNE-P after March 11, 2006, the CPUC did not have authority to set rates for the UNE-P after that date. *See Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm'n*, 461 F.Supp.2d 1055, 1068-69 (E.D.Mo.2006) (rejecting state commission argument that it had authority to set rates under Section 271 of Act, and holding that "the statute limits state commission arbitration and rate-setting authority to items required under § 251."); *cf. Qwest Corp. v. Public Utils. Comm'n of Ohio*, 479 F.3d 1184, 1197 (10th Cir.2007) ("However, the state commissions cannot create a duty to provide services not required by the statute, so their arbitration power cannot extend beyond the four corners of § 251.").

The CPUC asserts that absent continued rate regulation, CLECs would have no ability to get access to the equipment and facilities they need to provide service to their customers. This contention ignores the FCC's findings in the *TRRO* that "competitive LECs not only have deployed a significant growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets." *TRRO* ¶ 199. To the extent the CPUC asserts that CLECs would be at the mercy of ILECs' anticompetitive pricing, and that CLECs would be without a remedy, the Court disagrees and finds that the appropriate remedy in that case would be to seek relief at the FCC, which has jurisdiction to enforce Sections 201 and 215 of the Telco Act.

2. Access to entrance facilities[6]

The CPUC ruled that although the *TRRO* held that entrance facilities[7] are no longer a UNE under Section 251(c)(3), CLECs are entitled to receive entrance facilities at TELRIC rates for purposes of interconnection under Section 251(c)(2). The CPUC rejected AT&T's argument that Section 251(c)(2) only allows CLECs to interconnect the CLEC's *own* facilities to the incumbent's network, and does not require the ILEC to provide any facilities. In reaching its ruling, the CPUC relied on the following passage from the *TRRO*:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.

TRRO ¶ 140. The CPUC stated in its order, "[c]learly, the FCC established that interconnection would include the facilities used to effect that interconnection, and those facilities encompass more than just the crossconnects described by SBC. The FCC is

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[6] The parties agree that the CPUC applied its ruling on entrance facilities to facilities running not only between ILEC and CLEC networks, but also between CLEC networks and AT&T's "SS7" signaling network, and that the Court's resolution of this issue applies to both CPUC rulings.

[7] An entrance facility is a form of dedicated transport that provides a transmission path between the networks of an ILEC and a CLEC.

also clear that interconnection, like UNEs, should be priced at TELRIC." RE 1959.

AT&T argues that the FCC's statement in Paragraph 140 does not itself actually impose an obligation to make any facilities, much less entrance facilities, available pursuant to Section 251(c)(2). AT&T argues that the FCC was merely observing that its ruling on entrance facilities "does not alter" a pre-existing right to obtain "interconnection" facilities. AT&T contends that nothing in the FCC's prior rules or orders specifically requires ILECs to provide entrance facilities pursuant to Section 251(c)(2). AT&T also argues that unlike the unbundled access requirement set out in Section 251(c)(3), Section 251(c)(2) does not contemplate the provision of any ILEC facilities to CLECs. AT&T notes that Section 251(c)(2) imposes a duty to provide interconnection "*for* the facilities and equipment *of [the] requesting telecommunications carrier.*" 47 U.S.C. § 251(c)(2) (emphasis added). AT&T contends that the CPUC's requirement – that AT&T provide the actual facility that the CLEC uses to connect its network to AT&T's – goes well beyond this limited mandate.

The Court is not persuaded by AT&T's arguments, and finds that the CPUC did not violate the *TRRO* when it required AT&T to provide CLECs with its entrance facilities as needed for interconnection. AT&T's interpretation of the *TRRO* would render Paragraph 140 meaningless; if AT&T were correct, there was no need for the FCC to discuss CLECs' right to obtain interconnection facilities within the context of entrance facilities. The Court finds it significant that the FCC was careful to emphasize that "our finding of non-impairment with respect to entrance facilities does not alter the right of competi-

tive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service." *TRRO* ¶ 140. The Court agrees with the CPUC that this distinction is logical based on the two different uses to which entrance facilities are put: (1) when used by a CLEC as a transmission path to carry traffic to and from its end users on the CLEC's own network ("backhauling"); and (2) when used as a transmission path providing a link between ILEC and CLEC switches for the exchange of traffic between the two networks ("interconnection"). The Court also rejects AT&T's contention that the *TRRO* does not require that ILECs lease the interconnection facilities themselves to CLECs. The FCC has interpreted "interconnection" to mean "the physical linking of two networks for the mutual exchange of traffic." *TRO* ¶ 176.

The Court's decision is consistent with the holdings of two other federal courts that have addressed this issue. In *Southwestern Bell Telephone L.P.*, 461 F.Supp.2d 1055 (E.D.Mo.2006), the court held that the state commission properly required ILECs to make entrance facilities available for interconnection under Section 251(c)(2). *Id.* at 1071-73. The court noted that "carriers can use entrance (transmission) facilities for at least two distinct purposes" – backhauling and interconnection – and that only the former was precluded by the *TRRO*. *Id.* at 1071-72. In *Illinois Bell Telephone Company v. Box*, 2007 WL 2815924 (N.D.Ill. Sept. 21, 2007), the court reached the same conclusion. *Id.* at *7-8. The court rejected the argument – advanced by AT&T here – that requiring ILECs to make entrance facilities available for interconnection was tantamount to imposing an

unlawful unbundling duty under another name. "The Arbitration Decision does not require AT&T to lease entrance facilities as UNEs for the full range of uses permitted by section 251(c)(3) – nor could it given the FCC's determination that CLECs are not entitled to entrance facilities as UNEs under that subsection. Instead, the Arbitration Decision requires AT&T to make entrance facilities available for the sole purpose of interconnection under section 251(c)(2)." *Id.* at *6.

3. Transport rule

AT&T challenges the CPUC's interpretation of an FCC rule limiting the availability of DS1 transport circuits where DS1 transport is available as a UNE. The FCC rule states,

> **Cap on unbundled DS1 transport circuits.** A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

47 C.F.R. § 51.319(e)(2)(ii)(B). Relying on language from the *TRRO*, the CPUC held that the 10 DS1 cap does not apply to transport routes where DS3 transport is also available as a UNE. RE 1923-25. Under the CPUC's ruling, CLECs can order an unlimited number of DS1s as long as DS3 transport is available as a UNE. The CPUC cited Paragraph 128 of the *TRRO*, which states, "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits."

AT&T contends that the CPUC's ruling is contradicted by the plain text of the FCC rule, and should be reversed on that basis alone. The CPUC acknowledges that the limitation it imposed is not contained in the language of the FCC rule. However, the CPUC argues its holding simply effectuates the FCC's intention – as stated in the *TRRO* – to cap the number of unbundled DS1 transport circuits only on transport routes where DS3 is not available as a UNE. AT&T attempts to reconcile the FCC rule with the *TRRO* by arguing that the *TRRO* never states that the DS1 cap applies *only* to routes with no unbundling obligation for DS3 transport. AT&T argues that Paragraph 128 of the *TRRO* "is instead intended to emphasize and clarify that a limit of 10 DS1 dedicated transport circuits *also* applies to those routes where unbundled DS1 dedicated transport is available and DS3 unbundled transport is not."

One other court has addressed the apparent discrepancy between the FCC's rule and the *TRRO*, and held that the FCC rule is controlling. In *Cbeyond Communications of Texas, L.P. v. The Public Utility Comm'n of Texas*, 2006 U.S. Dist. LEXIS 7381 (W.D.Tex. Jan. 24, 2006), the state commission adopted the cap on DS1 transport circuits as stated in the FCC rule, and rejected the CLECs' arguments that the cap should be limited based on the *TRRO*. The court upheld the state commission's interpretation. The court first rejected both sides' efforts to reconcile the FCC rule and Paragraph 128 of the *TRRO*, finding instead that the "plain text of the two sentences at issue is facially irreconcilable." *Id.* at *11. The court found that the FCC rule "is stated in general terms, and there is no language on which one could reasonably base a conclusion that any excep-

tions were intended." *Id.* at *12-13. The court also rejected the CLECs' reliance on *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002), to argue that the limitation from the *TRRO* should be imported into the rule. "[T]he high court was faced [in *Verizon*] with assigning meaning to an ambiguous term left undefined by the regulations. . . . *Verizon* did not stand, however, for the much different proposition that an underlying agency order can be read not to interpret, but to *change* the meaning of a regulation's text." *Id.* at *14 (emphasis in original).

The Court agrees with the reasoning of *Cbeyond*, and holds that the plain language of the FCC rule, which includes no exceptions to the 10 DS1 transport circuit cap, is controlling. This Court is unpersuaded by the parties' attempts to reconcile the language of the FCC rule and the *TRRO*; the FCC rule broadly states that the cap applies "on each route where DS1 dedicated transport is available on an unbundled basis," while the *TRRO* states "[o]n routes *for which we determine that there is no unbundling obligation for DS3 transport*, but for which an impairment exists for DS1 transport, we limit the number of DS1 transport circuits . . . ." *TRRO* ¶ 128 (emphasis added). To harmonize the FCC rule and Paragraph 128 requires ignoring the plain language of both.

The CPUC contends, as the CLECs did in *Cbeyond*, that the FCC's rule must be read in conjunction with the *TRRO*. However, none of the cases cited by the CPUC stand for the proposition that an FCC order can void clear and conflicting language of an FCC rule. *See Verizon*, 535 U.S. at 535-38 (looking to FCC order to illuminate regulation on "technical feasibility"); *SBC Inc. v. FCC*, 414 F.3d 486, 499-500 (3d

Cir.2005) (recognizing general proposition that FCC order and regulation should be read together, but finding no inconsistency between two); *MCIMetro Access Transmission Servs. v. Bellsouth Telecomms. Inc.*, 352 F.3d 872, 883 (4th Cir.2003) (rejecting state commission's limitation based on FCC order in face of "otherwise unambiguous rule").

4. Notice and grandfathering provisions

The CPUC required AT&T to provide at least 60 days notice before it changes the availability of a product in AT&T's federal and state access tariffs if a CLEC is using the affected service as part of a commingled arrangement.[8] The CPUC also required AT&T to grandfather the access services in its California tariff in the event that loss of those services would affect a CLEC's commingling arrangement. RE 1946-47.

The CPUC asserts that both the notification and grandfathering provisions give CLECs time to find and transition to alternatives to the ILEC's tariffed service, without disruption to customers or unnecessary expense. The CPUC provides the following example:

> For example, a CLEC might buy dedicated transport from an ILEC's special access tariff and use that transport to move telecommunications traffic between its and the ILEC's switch and then on to a residence via the ILEC's loop. If the ILEC restricts the availability of the dedicated transport service, the CLEC would be unable to move traffic between switches and thus unable to

[8] In a commingled arrangement, the CLEC combines a UNE and a tariffed service, and cannot provide service to its customers without both elements.

> serve its customers. The CLEC could either lay its own cable for transport or buy a similar service from a competitive access provider (which, in turn, interconnects with the ILEC's switch), but neither option realistically can be implemented in a 7 or 15 day window. Without notification of future tariff changes, CLECs will be unable to acquire substitute equipment and facilities and maintain service to their customers.

Cross-motion at 18-19.

AT&T raises a number of challenges to the CPUC's notice and grandfathering provisions. Most persuasively, AT&T contends that these provisions violate the filed-tariff doctrine. The filed-tariff doctrine bars one customer from receiving services under a tariff on terms that are different from those applied to other customers of the same tariff. *See generally Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000). AT&T argues that under the notice and grandfathering requirements, not all carriers that purchase AT&T's tariffed services will be treated equally. Instead, AT&T contends, the tariff customers who commingle the services they purchase from AT&T's tariffs with UNEs will receive favorable treatment in comparison to tariff customers who do not commingle, by obtaining advance notice of alterations to the tariffs, and by obtaining continued access to tariffed terms after those terms have become unavailable to other carriers.

The CPUC argues that the notice requirements do not affect any federal or state tariffs, and thus the filed-tariff doctrine is inapplicable. However, as the Supreme Court has held, the filed-tariff doctrine applies to more than rates and ratesetting:

> Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. "If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge. . . . An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price." *Competitive Telecommunications Assn. v. FCC*, 998 F.2d 1058, 1062 (C.A.D.C.1993). The Communications Act recognizes this when it requires the filed tariff to show not only "charges," but also "the classifications, practices, and regulations affecting such charges," 47 U.S.C. § 203(a); and when it makes it unlawful to "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges" except those set forth in the tariff, § 203(c).

American Tel. & Tel. Co. v. Central Ofice Tel. Inc., 524 U.S. 214, 223-24, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998). The Court noted that "discriminatory 'privileges' come in many guises," such as expedited shipping or expedited processing of orders. *Id.* at 224-25. Here, under the notice and grandfathering provisions, CLECs that use access service as part of a commingled arrangement would receive preferential treatment in comparison to CLECs that purchase the same service from the same tariff, but do not use that service in a commingled arrangement. *See* Indiana

Order, 2006 Ind. PUC LEXIS 40, at *189 ("The CLECs' proposals regarding notice and early termination are also unlawful under the filed-rate doctrine, because they would force SBC Indiana to provide the CLECs that enter into the Agreement with more favorable terms and conditions than those accorded to other carriers and special access customers in the state, whose service will continue to be governed by the FCC's and Commission's rules.").

The CPUC contends that even if the filed-tariff doctrine applies, it does not bar the notice and grandfathering provisions because CLECs that use access services as part of a commingled arrangement are not "similarly situated" to other CLECs. The CPUC does not cite any authority holding that customers of the same tariff are not similarly situated, and the cases cited by the CPUC are inapposite. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 298, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (holding tax exemption for regulated natural gas utilities not discriminatory under Commerce Clause because utilities and independent marketers serving different markets are not similarly situated); *Global Naps, Inc. v. Verizon New England, Inc.*, 327 F.Supp.2d 290, 301 (D.Vt.2004) (holding prohibition on offering service did not violate filed-tariff doctrine because "[t]he ban does not have the effect of discriminating, or requiring Global to discriminate, among Global's customers; it simply does not permit Global to offer the service to any of its customers.").

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS in part and DENIES in part plaintiff's motion for summary judgment (Docket No. 27) and GRANTS in part and

DENIES in part defendant's motion for summary judgment. (Docket No. 30).

IT IS SO ORDERED.

Dated: February 21, 2008

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

Decision 07-01-019 January 11, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996.

Application 05-07-024
(Filed July 28, 2005)

ORDER GRANTING LIMITED REHEARING OF DECISION (D.) 06-01-043 ON THE ISSUE REGARDINIG RULES ON FIBER-TO-THE-HOME (FTTH), FIBER-TO-THE-CURB (FTTC) AND HYBRID LOOP, MODIFYING THE DECISION AND DENYING REHEARING, AS MODIFIED, IN ALL RESPECTS

I. SUMMARY

This decision grants limited rehearing to modify D.06-01-043 (the Decision), a change-of-law proceeding resulting from changes in federal unbundling obligations of incumbent local exchange carriers (ILECs). The Decision adopts an amendment to existing interconnection agreements (ICAs) that various competitive local exchange carriers (CLECs) have with SBC California (SBC). SBC was directed to negotiate amendments to its ICAs with CLECs in order to implement the changes in unbundling rules and to initiate a consolidated proceeding to resolve any disputed issues. Issues upon which the parties were unable to agree are the subject of the Decision.

We modify our ruling with respect to whether Federal Communications Commission (FCC) rules on fiber-to-the-home (FTTH), fiber-to-the-curb (FTTC), and hybrid loop rules apply to all customers, or only to mass market customers. We originally held that these rules apply only to mass market customers. Upon reconsideration of this issue, we have determined that FTTH, FTTC and hybrid loop rules apply to all customers. In addition, we clarify the Decision in certain respects, as discussed herein, and correct clerical errors. The rehearing of D.06-01-043, as modified, is denied in all respects.

II. BACKGROUND/FACTS

On July 28, 2005, Pacific Bell Telephone Company, dba SBC California (SBC), filed its application to initiate a generic proceeding to amend the existing interconnection agreements (ICAs) between SBC and various competitive local exchange carriers (CLECs).[1] This proceeding implements orders issued by the Federal Communications Commission (FCC) in 2003 and 2005. The first order, the *Triennial Review Order* (*TRO*), was released on August 21, 2003.[2]

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[1] Pacific Bell Telephone Company was doing business as SBC California (SBC-CA). After its merger with AT&T Corporation on November 21, 2005, it now does business as AT&T California. References to SBC, SBC-CA, or AT&T are to the same company.

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (2003) 18 F.C.C. Rcd. 16978, FCC 03-36 (TRO). Prior to the *TRO*, the FCC issued its *Local Competition Order* which established a list of seven UNEs that the ILECs were required to provide and established the TELRIC methodology. (*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185,

The *TRO* re-interpreted the "impair" standard of Section 251(d)(2) and revised the list of unbundled network elements (UNEs) that ILECs must provide to requesting carriers.[3] Various parties appealed the *TRO*, and on March 2, 2004, the D.C. Circuit decided *United States Telecom Ass'n v. FCC* (D.C. Cir. 2004) 359 F.3d 554 (*USTA II*) *cert. denied*, (2004) 125 S.Ct. 313. In response to the court's directives in *USTA II*, the FCC issued the *Triennial Review Remand Order* (*TRRO*) in 2005.[4] Among other things, the *TRRO* established a nationwide bar on unbundled switching.

On July 22, 2005, this Commission issued D.05-07-043, its *TRO Closure Order*, closing its TRO proceed-

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First Report and Order (1996) 11 F.C.C. Rcd 15499, 15846-50 (subsequent history omitted). At the Eighth Circuit Court of Appeals, the Court affirmed some parts of the order and reversed others. (*Iowa Utils. Bd. v. FCC* (8th Cir. 1997) 120 F.3d 753. The FCC and various other parties appealed to the U.S. Supreme Court. In January 1999, the Supreme Court held that the FCC had not adequately considered the "necessary" and "impair" standards of §251(d)(2) in establishing the seven network elements. (*AT&T Corp. v. Iowa Utils. Bd.* (1999) 525 U.S. 366. In November 1999, the FCC responded to the Supreme Court's remand by issuing the *UNE Remand Order* (1999)15 F.C.C. Rcd 3696), which reevaluated the unbundling obligations of the ILECs and promulgated new unbundling rules. The D.C. Circuit granted petitions for review and vacated and remanded those portions of the *UNE Remand Order* interpreting the "impair" standard and establishing a nationwide list of mandatory UNEs. (*United States Telecom Ass'n v. FCC* (D.C.Cir. 2002)290 F.3d 415 (*USTA I*).

[3] All section references are to U.S. Code, unless otherwise specified.

[4] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand (Feb. 4, 2005) 20 F.C.C. Rcd. 2533, FCC 04-290 (*TRRO*).

ing.[5] SBC was directed to negotiate amendments to its ICAs with CLECs in order to implement the *TRRO* and to initiate a consolidated proceeding to resolve any disputed issues. Accordingly, SBC filed this application, A.05-07-024.

On September 16, 2005, the CLECs filed a consolidated response to SBC's application. Administrative Law Judge (ALJ) Ruling of September 23, 2005 directed that any carrier with an interconnection agreement with SBC that has a dispute concerning the change-of-law provisions related to the FCC's *TRO* and *TRRO* orders will be subject to the outcome of this proceeding. On October 6, 2005, the ALJ issued a ruling establishing a procedural schedule for the proceeding. The proceeding was set to operate on three separate tracks: (1) first track does not require evidentiary hearings; (2) track for batch hot cut portion; and (3) evidentiary hearings for disputed issues of fact. This decision proceeded under the first track.

On January 27, 2006, the Commission issued D.06-01-043 (Decision), which resolved 44 disputed issues. On February 27, 2006, SBC timely filed an application for rehearing of the Decision on numerous grounds: (1) the Decision should follow the clear text of the FCC's Rules on fiber-to-the-home (FTTH) and Hybrid Loop, which found that these loop apply to all customers; (2) the Commission should reverse its holding that the CLECs may get entrance facilities at total element long run incremental cost (TELRIC) rates pursuant to Section 251(c)(2), in consideration of the fact that the Decision does not make any sense in light of the FCC's "no impairment" holding; (3) the

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[5] *Order Closing the Triennial Review Nine-Month Phase* (*TRO Closure Order*) [D.05-07-043] (2005) ___ Cal.P.U.C.3d ___, in R.95-04-043 & I.95-04-044.

Decision incorrectly reads Section 251(c) to require the provision of facilities; (4) the DS1 cap applies to all routes; (5) the Decision is inconsistent and incorrect in its treatment of conversion charges; (6) the Decision incorrectly mandates resale pricing after March 11, 2006; (7) the Decision incorrectly resolves wire center certification issues; (8) the Commission cannot change tariff requirements here; and (9) the Commission should clarify that it has made no determination regarding whether it has jurisdiction over Section 271 rates.

On March 14, 2006, approximately 22 CLECs filed their Joint Response to AT&T's rehearing application.[6] The CLECs disagreed with AT&T on essentially all points made in the rehearing application. They asserted that the Commission correctly determined the following: (1) the FCC's Rules for FTTH, FTTC, and Hybrid Loops apply only to mass market customers; (2) entrance facilities are available to CLECS at TELRIC rates for use in interconnection; (3) the cap on DS1 transport should apply only on circuits where DS3 transport is not available as a UNE; (4) correctly applied the requirements of the *TRO* in determining when and how much SBC should be

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[6] The Joint Response was filed by A+ Wireless, Inc., Advanced TelCom, Inc., Arrival Communications, Inc., California Catalog & Technology, Inc., CBeyond Communications, LLC, CF Communications, LLC d/b/a Telekenex, Covad Communications Company, Curatel, LLC, DMR Communications, Inc., Eschelon Telecom, Inc., Lightyear Network Solutions, LLC, Mpower Communications Corp., NII Communications, Ltd., North County Communications, Inc., PNG Telecommunications, Inc., RCN Telecom Services, Inc., TCast Communications, Inc., The Telephone Connection Local Services, Inc., Telscape Communications, Inc., U.S. TelePacific Corp., Utility Telephone, Inc., and Wholesale Air-Time, Inc.

permitted to charge for conversions; and (5) that the Decision correctly resolved wire center certification issues. They argue further that the Commission should not alter its decision that UNE-P lines "default" to resale rates if CLECs could not submit orders by March 10, 2006; that it should maintain its notice and grandfathering requirements regarding SBC's access services upon which CLECs rely for commingling arrangements; and AT&T's "clarifications" set forth in Issue 7 are unnecessary.

We have reviewed each and every allegation of error asserted by the rehearing applicant, and are of the opinion that legal error was not demonstrated. Therefore, for the reasons stated, we deny in all respects the rehearing of D.06-01-043, as modified herein.

III. DISCUSSION

* * * * *

B. The Decision Correctly Held that Entrance Facilities and SS7 Shall Be Provided to the CLECs at TELRIC Rates for Use in Interconnection. (Issue 51: Sections 14.2, 14.3, 14.4, and 14.5; Issue 52: Sections 15 and 1.1(1X))

An entrance facility is a form of dedicated transport that provides a transmission path between the networks of AT&T and a CLEC. As noted in the Decision at p. 83, the parties agree that both the *TRO* and the *TRRO* held that entrance facilities need not be unbundled, and are no longer a UNE under Section 251(c)(3) of the 1996 Act.[13] Issues 51 and 52, respectively, are whether TELRIC rates apply to

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[13] Telecommunications Act of 1996 (the 1996 Act), 47 U.S.C. §151 *et seq.*, 104 P.L. 104.

entrance facilities for use in interconnection under Section 251(c)(2), and whether those rates apply to Signaling System 7 (SS7). The Decision holds that pricing for entrance facilities and SS7 shall be at TELRIC rates when used for interconnection pursuant to Section 251(c)(2), which governs interconnection.

AT&T disagrees with the Decision's ruling that TELRIC rates apply to entrance facilities and SS7 when used for interconnection pursuant to Section 251(c)(2). AT&T asserts that the ILEC is not required to provide any facilities under Section 251(c)(2). According to AT&T, Section 251(c)(2) only requires it to permit a CLEC to interconnect the CLEC's own facilities to the ILEC's network, i.e., the CLECs are allowed only to choose a point at which to interconnect with the ILEC's network. AT&T claims that Section 251(c)(2) cannot be read to require the provision of *any* facilities. Rather, it requires AT&T to provide interconnection "*for* the facilities and equipment of any requesting telecommunications carrier – but not the facilities themselves."[14] Therefore, AT&T urges the Commission to reverse its holding that CLECs may get entrance facilities at TELRIC rates pursuant to the interconnection requirements of 47 U.S.C. Section 251(c)(2).

The CLECs take a different position. They argue that although the FCC declassified entrance facilities as a UNE under Section 251(c)(3), that decision does not affect the requirement that ILECs provide entrance facilities at TELRIC prices when used for interconnection pursuant to Section 251(c)(2). They assert that the *TRO* clearly stated, and the *TRRO*

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[14] SBC Rhg. App., p. 12.

affirmed, that ILECS must continue to provide entrance facilities to CLECs for interconnection under Section 251(c)(2), although they need not provide them as UNEs under Section 251(c)(3).[15] The CLECs assert that the FCC recognized that entrance facilities fall into two distinct uses: (1) when used by CLECs for backhaul to their own networks, they would be delisted as UNEs; and (2) when used for interconnection with the ILEC's network, they would continue to be available at TELRIC rates.

The CLECs cite the *TRO* as support for the distinction in the treatment of entrance facilities when used as dedicated transport pursuant to Section 251(c)(3), as opposed to entrance facilities when used for interconnection under Section 251(c)(2):

> [C]ompetitive LECs often use transmission links including unbundled transport connecting incumbent LEC switches or wire centers in order to carry traffic to and from its end users. These links constitute the incumbent LEC's own transport network. However, in order to access UNEs, including transmission between incumbent LEC switches or wire centers, while providing their own switching and other equipment, competitive LECs require a transmission link from the UNEs on the incumbent LEC network to their own equipment located elsewhere. Competitive LECs use these transmission connections between incumbent LEC networks and their own networks both for interconnection and to backhaul traffic. Unlike the facilities that incumbent LECS explicitly must make available for Section 251(c)(2) interconnection [footnote omitted], we find that

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[15] CLECs' Joint Rhg. Response at 18.

> the Act does not require incumbent LECs to unbundle transmission facilities connecting incumbent LEC networks to competitive LECs for the purpose of backhauling traffic.[16]

Moreover, as the CLECs note, in the *TRRO*, the FCC reaffirmed its finding that ILECs must offer dedicated transport needed for Section 251(c)(2) interconnection at cost-based rates, although they need not be unbundled and are no longer a UNE under Section 251(c)(3). *TRRO*, ¶140 provides as follows:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to Section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service [footnote omitted]. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.[17]

Thus, AT&T's argument limiting the ILEC's obligations under Section 251(c)(2) to a point of interconnection, rather than the facilities necessary for interconnection, is clearly refuted by the *TRRO* as cited above.

The Decision determined that the FCC established that interconnection would include the facilities used to effect that interconnection, and those facilities encompass more than just the cross-connects described

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[16] CLECs' Joint Rhg. Response at p, 20, citing *TRO*, *supra*, ¶365 (footnote omitted)(emphasis added).

[17] *TRRO*, *supra*, at ¶140, citing *TRO*, *supra*, at ¶366, emphasis added.

by AT&T. The Decision noted further that the FCC is clear that interconnection, like UNEs, should be priced at TELRIC.[18] Similarly, the Decision found that the FCC's finding of non-impairment with respect to SS7 signaling does not alter the CLECs' right to interconnect with AT&T's SS7 signaling networks, pursuant to Section 251(c)(2) for use in connection with the exchange of traffic. We continue to believe that these findings are correct. Accordingly, we affirm our determination that TELRIC rates apply to entrance facilities and SS7.

AT&T urges the Commission to look to rulings in other states. While not bound by those rulings, we found a recent decision from the federal district court in Missouri to be particularly compelling. In that case, Southwestern Bell Missouri (SBC-MO) made arguments in federal district court against the Missouri Public Service Commission strikingly similar to those made by AT&T here.[19] In *Southwestern Bell*, SBC-MO asserted that an arbitration order violated the *TRRO* by requiring SBC to provide entrance facilities at TELRIC rates, although CLECs are no longer impaired with respect to entrance facilities, and are not entitled to these facilities as UNEs under Section 251(c)(3). The Missouri Commission held that CLECs are entitled to entrance facilities, as needed for interconnection pursuant to Section 251(c)(2), and TELRIC is the correct rate for these facilities. The Court concluded that the Missouri Commission's Arbitration Order correctly implements the FCC's rulings on entrance facilities as set

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[18] D.06-01-043, p. 85.

[19] *Southwestern Bell Telephone v. Missouri Public Service Commission* (2006) ___F. Supp. ___ 2006 U.S. Dist. LEXIS 65536.

forth in the *TRRO* and the *TRO*. As here, the Court relied on *TRRO*, *supra*, at ¶140 (*TRO*, *supra*, at ¶366), when it stated as follows:

> The TRRO is clear . . . that the FCC's 'finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to §251(c)(2) for the transmission and routing of telephone exchange service and exchange access service.' [Citation omitted.] 'Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.'[20]

The Court also recognized the distinction between entrance facilities when used for interconnection pursuant to Section 251(c)(2), as opposed to their use as dedicated transport as unbundled network elements pursuant to Section 251(c)(3).

For all of the above reasons, we find no merit in AT&T's challenge of our finding that entrance facilities and SS7, when used for interconnection pursuant to Section 251(c)(2), shall be priced at TELRIC rates. We also concur that the CLECs are entitled to entrance facilities, as needed, for interconnection pursuant to Section 251(c)(2).

* * * * *

IV. CONCLUSION

We have reviewed each and every allegation of error asserted by the rehearing applicant, and are of the opinion that legal error was not demonstrated. However, we grant limited rehearing to modify our

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[20] *Id.*, at *15.

holding with respect to whether FCC rules on FTTH, FTTC, and hybrid loop rules apply to all customers, or only to mass market customers. We originally held that these rules apply only to mass market customers. Upon reconsideration of this issue, we have determined that FTTH, FTTC and hybrid loop rules apply to all customers. In addition, we clarify the Decision in certain respects, as discussed herein, and we correct typographical errors. The rehearing of D.06-01-043, as modified, is denied in all respects.

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The rehearing of D.06-01-043, as modified, is hereby denied in all respects.

This order is effective today.

Dated January 11, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

Decision 06-01-043 January 26, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996.

Application 05-07-024
(Filed July 28, 2005)

DECISION ADOPTING AMENDMENT TO EXISTING INTERCONNECTION AGREEMENTS

I. Summary

In this decision, we adopt an amendment to the existing interconnection agreements (ICAs) that various Competitive Local Exchange Carriers (CLECs) have with SBC California (SBC). This change-of-law proceeding results from changes in federal unbundling obligations of Incumbent Local Exchange Carriers (ILECs). The Commission directed SBC to negotiate amendments to its ICAs with CLECs in order to implement the changes in unbundling rules and to initiate a consolidated proceeding to resolve any disputed issues. The purpose of this proceeding is for the Commission to resolve those issues on which parties were unable to come to agreement.

II. Background

Pacific Bell Telephone Company d/b/a SBC California (SBC) filed its application to initiate a generic proceeding to amend the existing ICAs between SBC and various CLECs on July 28, 2005. In orders

issued in 2003 and 2005, known, respectively, as the *Triennial Review Order* (TRO)[1] and the *Triennial Review Remand Order* (TRRO),[2] the Federal Communications Commission (FCC) eliminated or restricted the unbundling obligations for numerous Unbundled Network Elements (UNEs). Because the bulk of SBC's ICAs were negotiated and arbitrated before the *TRO* and *TRRO* were issued, those agreements for the most part do not embody the significant changes to the unbundling rules reflected in those FCC orders.

In the wake of the *TRRO*, this Commission issued the *TRO Closure Order*, which closed its TRO proceeding. The Commission also directed SBC to negotiate amendments to its ICAs with CLECs in order to implement the *TRRO* and to initiate a consolidated proceeding to resolve any disputed issues. Accordingly, SBC filed its application.

We reiterate the September 23, 2005 Ruling by the Administrative Law Judge (ALJ) that any carrier with an interconnection agreement with SBC that has a dispute over the change-of-law provisions related to the FCC's *TRO* and *TRRO* orders will be subject to the outcome of this proceeding. The Commission does not intend to conduct individual arbitrations to implement change-of-law provisions relating to the two FCC orders. SBC was required to send

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[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978, FCC 03-36 (2003)(TRO).

[2] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533, FCC 04 290 (rel. Feb. 4, 2005) (TRRO).

a copy of the Ruling to each carrier with whom it has an interconnection agreement so that any carrier that wanted to could take an active role in the proceeding.

The CLECs filed a consolidated response to SBC's application on September 16, 2005. That filing included a markup of the disputed issues in the amendment. Following a series of telephone conference calls with the parties to the proceeding, the assigned ALJ issued a Ruling on October 6, 2005 that established a procedural schedule for the proceeding.

The proceeding will proceed in three separate tracks. The first track involves disputed issues that do not require hearings. Parties filed Opening Briefs on those issues on October 28, 2005, and Reply Briefs on November 14, 2005. Those issues are the subject of this decision.

A separate procedural schedule was adopted for the Batch Hot Cut portion of the proceeding. Finally, one issue area was set aside for hearing to resolve disputed issues of fact. That issue, the rate for Routine Network Modifications (RNM) and the RNM parity issue was addressed in arbitration hearings November 28-30 and December 1, 2005. Opening Briefs were filed on RNM issues on January 9, 2006 and Reply Briefs, January 25, 2006. Those issues will be addressed in a subsequent Commission order.

III. Disputed Issues

The parties brought 44 disputed issues for the Commission that are resolved in this decision. This count excludes six disputed issues that relate to Routine Network Modifications and Batch Hot Cuts, that will be addressed separately.

* * * * *

NN. Issue 51: Sections 14.2, 14.3, 14.4, and 14.5 – Is SBC required to provide entrance facilities to CLECs pursuant to 251(c)(3)? If not, what is the applicable process for the transition or disconnection of such facilities? Is SBC required to provide entrance facilities to CLECs for use in interconnection pursuant to Section 251(c)(2)? If so, what rate should apply? May CLEC request that entrance facilities or dedicated transport be "reclassified" as an interconnection facility and, if yes, what rate, if any, should apply?

An entrance facility is a form of dedicated transport that provides a transmission path between the networks of SBC and a CLEC. The parties agree that both the *TRO* and *TRRO* held that entrance facilities need not be unbundled, and are no longer a UNE under Section 251(c)(3). The dispute is whether the CLECs are entitled to continue to receive entrance facilities for purposes of interconnection under Section 251(c)(2).

SBC asserts that Section 251(c)(2) , which governs interconnection, does not require the provision of any facilities, but only requires that the incumbent permit a CLEC to interconnect the CLEC's own facilities to the incumbent's network.

The CLECs do not agree, stating that the CLECs have obtained entrance facilities from SBC both (1) to use to backhaul their own services from the central office to their own facilities and (2) to interconnect with SBC's network for the transmission and routing of telephone exchange service and exchange access service. CLECs state that they were entitled

to access for the first purpose as a UNE under Section 251(c)(3), and for the second purpose under Section 251(c)(2). According to the CLECs, the FCC held unequivocally that though it declassified entrance facilities as a UNE under Section 251(c)(3), nothing in that decision affected the requirement that ILECs provide such facilities at TELRIC prices when used for interconnection pursuant to Section 251(c)(2).[28]

SBC on the other hand states that it is clear that Section 251(c)(2) does not require the provision of any facilities, but only requires that the incumbent permit a CLEC to interconnect the CLEC's own facilities to the incumbent's network.

In other words, SBC asserts that Section 251(c)(2) allows CLECs only to choose a "point": at which to interconnect with the ILEC's network; it is Section 251(c)(3) that "further" allows CLECs to obtain access to ILEC facilities. SBC also states that even assuming the text of Section 251(c)(2) could be read to require the provision of any facilities at all, the required facilities are limited to those facilities located at the interconnection point that is within SBC's network, not the miles of transport ordered by CLECs extending outside SBC's network. According to SBC, the *TRO* and *TRRO* require at most that ILECs provide crossconnect facilities that permit CLECs to connect their own networks at a technically feasible point within the ILEC's network.

The *TRO* and the *TRRO* do not support SBC's contention that interconnection responsibilities do not include facilities.

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[28] The CLECs cite *TRO* ¶¶ 366 and 368 and *TRRO* ¶ 140.

> In reaching this determination[29] we note that, to the extent that requesting carriers need facilities in order to "interconnect[] with the [incumbent LEC's] network," section 251(c)(2) of the Act expressly provides for this and we do not alter the Commission's interpretation of this obligation.
>
> In addition, *TRRO* ¶ 140 reads as follows:
>
> [o]ur finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) *for the transmission and routing of telephone exchange service and exchange access service.* Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network. (Emphasis added.)

Clearly, the FCC established that interconnection would include the facilities used to effect that interconnection, and those facilities encompass more than just the crossconnects described by SBC. The FCC is also clear that interconnection, like UNEs, should be priced at TELRIC. The CLECs' language in Sections 14.2-14.5 is adopted.

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IV. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. Comments were filed on January 18, 2006 and Reply Comments, on

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[29] The determination discussed in this paragraph is the FCC's determination that the dedicated transport UNE includes only those transmission facilities within the ILEC's network.

January 23, 2006. Those comments have been taken into account, as appropriate, in finalizing this decision.

V. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Karen A. Jones is the assigned ALJ in this proceeding.

* * * * *

ORDER

Therefore, **IT IS ORDERED** that:

1. Pursuant to the Telecommunications Act of 1996, the Amendment to the Interconnection Agreements between SBC California and various Competitive Local Exchange Carriers is adopted.

2. The parties' shall have in place fully-executed copies of the amendment within 14 days of the effective date of this order.

3. The effective date for the amendments shall be the effective date of this order.

This order is effective today.

Dated January 26, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President

GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
RACHELLE B. CHONG
Commissioners

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 47 U.S.C. § 251 provides:

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty –

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to tele-

phone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to

establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether –

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers

available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnec-

tion, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company

provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification –

(A) is necessary –

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition

applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that –

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association

pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if –

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

2. 47 U.S.C. § 252 provides:

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any

other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning –

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to

provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall –

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other

costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that –

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission –

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

3. 47 C.F.R. § 51.5 provides in relevant part:

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

* * * * *

Interconnection. *Interconnection* is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

* * * * *

Wire center. A wire center is the location of an incumbent LEC local switching facility containing one or more central offices, as defined in the Appendix to part 36 of this chapter. The wire center boundaries define the area in which all customers served by a given wire center are located.

4. 47 C.F.R. § 51.305 provides:

§ 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) The line-side of a local switch;

(ii) The trunk-side of a local switch;

(iii) The trunk interconnection points for a tandem switch;

(iv) Central office cross-connect points;

(v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) The points of access to unbundled network elements as described in§ 51.319;

(3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier; and

(4) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its

interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

(g) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.

5. 47 C.F.R. § 51.319(e) provides:

§ 51.319 Specific unbundling requirements.

* * * * *

(e) *Dedicated transport.* An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to dedicated transport on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part, as set forth in paragraphs (e) through (e)(4) of this section. A "route" is a transmission path between one of an incumbent LEC's wire centers or switches and another of the incumbent LEC's wire centers or switches. A route between two points (*e.g.*, wire center or switch "A" and wire center or switch "Z") may pass through one or more intermediate wire centers or switches (*e.g.*, wire center or switch "X"). Transmission paths between identical end points (*e.g.*, wire center or switch "A" and wire center or switch "Z") are the same "route," irrespective of whether they pass through the same intermediate wire centers or switches, if any.

(1) *Definition.* For purposes of this section, dedicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

(2) *Availability.* (i) *Entrance facilities.* An incumbent LEC is not obligated to provide a requesting carrier with unbundled access to dedicated transport

that does not connect a pair of incumbent LEC wire centers.

(ii) *Dedicated DS1 transport.* Dedicated DS1 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS1 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 1.544 megabytes per second and are dedicated to a particular customer or carrier.

(A) *General availability of DS1 transport.* Incumbent LECs shall unbundle DS1 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are Tier 1 wire centers. As such, an incumbent LEC must unbundle DS1 transport if a wire center at either end of a requested route is not a Tier 1 wire center, or if neither is a Tier 1 wire center.

(B) *Cap on unbundled DS1 transport circuits.* A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

(C) *Transition period for DS1 transport circuits.* For a 12-month period beginning on the effective date of the *Triennial Review Remand Order*, any DS1 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier

paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS1 transport pursuant to paragraphs (e)(2)(ii)(A) or (e)(2)(ii)(B) of this section, requesting carriers may not obtain new DS1 transport as unbundled network elements.

(iii) *Dedicated DS3 transport.* Dedicated DS3 transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dedicated DS3 transport consists of incumbent LEC interoffice transmission facilities that have a total digital signal speed of 44.736 megabytes per second and are dedicated to a particular customer or carrier.

(A) *General availability of DS3 transport.* Incumbent LECs shall unbundle DS3 transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle DS3 transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) *Cap on unbundled DS3 transport circuits.* A requesting telecommunications carrier may obtain a maximum of 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis.

(C) *Transition period for DS3 transport circuits.* For a 12-month period beginning on the effective

date of the *Triennial Review Remand Order*, any DS3 dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled DS3 transport pursuant to paragraphs (e)(2)(iii)(A) or (e)(2)(iii)(B) of this section, requesting carriers may not obtain new DS3 transport as unbundled network elements.

(iv) *Dark fiber transport.* Dedicated dark fiber transport shall be made available to requesting carriers on an unbundled basis as set forth below. Dark fiber transport consists of unactivated optical interoffice transmission facilities.

(A) *General availability of dark fiber transport.* Incumbent LECs shall unbundle dark fiber transport between any pair of incumbent LEC wire centers except where, though application of tier classifications described in paragraph (e)(3) of this section, both wire centers defining the route are either Tier 1 or Tier 2 wire centers. As such, an incumbent LEC must unbundle dark fiber transport if a wire center on either end of a requested route is a Tier 3 wire center.

(B) *Transition period for dark fiber transport circuits.* For an 18-month period beginning on the

effective date of the *Triennial Review Remand Order*, any dark fiber dedicated transport UNE that a competitive LEC leases from the incumbent LEC as of that date, but which the incumbent LEC is not obligated to unbundle pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, shall be available for lease from the incumbent LEC at a rate equal to the higher of 115 percent of the rate the requesting carrier paid for the dedicated transport element on June 15, 2004, or, 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the *Triennial Review Remand Order*, for that dedicated transport element. Where incumbent LECs are not required to provide unbundled dark fiber transport pursuant to paragraphs (e)(2)(iv)(A) or (e)(2)(iv)(B) of this section, requesting carriers may not obtain new dark fiber transport as unbundled network elements.

(3) *Wire center tier structure.* For purposes of this section, incumbent LEC wire centers shall be classified into three tiers, defined as follows:

(i) Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.

(ii) Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least

24,000 business lines, or both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.

(iii) Tier 3 wire centers are those incumbent LEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers.

(4) *Routine network modifications.* (i) An incumbent LEC shall make all routine network modifications to unbundled dedicated transport facilities used by requesting telecommunications carriers where the requested dedicated transport facilities have already been constructed. An incumbent LEC shall perform all routine network modifications to unbundled dedicated transport facilities in a nondiscriminatory fashion, without regard to whether the facility being accessed was constructed on behalf, or in accordance with the specifications, of any carrier.

(ii) A routine network modification is an activity that the incumbent LEC regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; installing a repeater shelf; and deploying a new multiplexer or reconfiguring an existing multiplexer. They also include activities needed to enable a requesting telecommunications carrier to light a dark fiber transport facility. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the installation of new aerial or buried cable for a requesting telecommunications carrier.

* * * * *

6. 47 C.F.R. § 51.321 provides:

§ 51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

(a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

(b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to:

(1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and

(2) Meet point interconnection arrangements.

(c) A previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point on any incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points. A requesting telecommunications carrier seeking a particular collocation arrangement, either physical or virtual, is entitled to a presumption that such arrangement is technically feasible if any LEC has deployed such collocation arrangement in any incumbent LEC premises.

(d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incum-

bent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

(e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. In such cases, the incumbent LEC shall be required to provide virtual collocation, except at points where the incumbent LEC proves to the state commission that virtual collocation is not technically feasible. If virtual collocation is not technically feasible, the incumbent LEC shall provide other methods of interconnection and access to unbundled network elements to the extent technically feasible.

(f) An incumbent LEC shall submit to the state commission, subject to any protective order as the state commission may deem necessary, detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations. These floor plans or diagrams must show what space, if any, the incumbent LEC or any of its affiliates has reserved for future use, and must describe in detail the specific future uses for which the space has been reserved and the length of time for each reservation. An incumbent LEC that contends space for physical collocation is not available in an incumbent LEC premises must also allow the requesting carrier to tour the entire premises in question, not only the area in which space was denied, without charge,

within ten days of the receipt of the incumbent's denial of space. An incumbent LEC must allow a requesting telecommunications carrier reasonable access to its selected collocation space during construction.

(g) An incumbent LEC that is classified as a Class A company under § 32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant as provided in part 69, subpart G, shall continue to provide expanded interconnection service pursuant to interstate tariff in accordance with §§ 64.1401, 64.1402, 69.121 of this chapter, and the Commission's other requirements.

(h) Upon request, an incumbent LEC must submit to the requesting carrier within ten days of the submission of the request a report describing in detail the space that is available for collocation in a particular incumbent LEC premises. This report must specify the amount of collocation space available at each requested premises, the number of collocators, and any modifications in the use of the space since the last report. This report must also include measures that the incumbent LEC is taking to make additional space available for collocation. The incumbent LEC must maintain a publicly available document, posted for viewing on the incumbent LEC's publicly available Internet site, indicating all premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space.

(i) An incumbent LEC must, upon request, remove obsolete unused equipment from their premises to increase the amount of space available for collocation.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

November 23, 2010

Mr. Scott H. Angstreich
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036

Re: Pacific Bell Telephone Company, dba
AT&T California v. California Public Utilities
Commission, et al.
Application No. 10A514

Dear Mr. Angstreich:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on November 23, 2010 extended the time to and including December 30, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ Ruth Jones

Ruth Jones
Case Analyst

[attached notification list omitted]

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No. 10-838

Supreme Court, U.S.
FILED
MAR 21 2011
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In The
Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY
d/b/a AT&T CALIFORNIA,

Petitioner,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION;
MICHAEL R. PEEVEY, TIMOTHY ALAN SIMON,
MICHEL P. FLORIO, and CATHERINE J. K. SANDOVAL,
in their official capacities as COMMISSIONERS OF THE
CALIFORNIA PUBLIC UTILITIES COMMISSION;
and CBEYOND COMMUNICATIONS, LLC,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS IN RESPONSE

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March 21, 2011

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QUESTION PRESENTED

Whether section 251(c)(2) of the Telecommunications Act of 1996, 47 U.S.C. § 251(c)(2), and implementing orders of the Federal Communications Commission require incumbent local exchange carriers to lease their entrance facilities to competitive local exchange carriers at regulated, cost-based rates when the competitors use the entrance facilities for the purpose of interconnection.

PARTIES TO THE PROCEEDING

Dian M. Grueneich, John A. Bohn, and Nancy E. Ryan – named as respondents in the petition – are no longer commissioners at the California Public Utilities Commission (CPUC). Ms. Grueneich's and Mr. Bohn's terms expired on December 31, 2010. Ms. Ryan was appointed to another position at the CPUC on or around January 21, 2011. On or around January 25, 2011, Michel P. Florio and Catherine J. K. Sandoval were appointed as Commissioners. Thus, the current Commissioners of the CPUC are Michael R. Peevey, Timothy Alan Simon, Michel P. Florio, and Catherine J. K. Sandoval.[1] Pursuant to Rule 35.3 of the Rules of the Supreme Court of the United States, Commissioners Florio and Sandoval have been automatically substituted as respondents.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondents CPUC and the individual Commissioners (Commissioners) state that the CPUC is a governmental entity.

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[1] The fifth commissioner position is vacant at this time.

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Order on Remand, *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 20 FCC Rcd. 2533 (2005) ..... *passim*

STATUTORY AND REGULATORY PROVISIONS INVOLVED

All but two of the relevant provisions of the Telecommunications Act of 1996 (Act) and Title 47 of the Code of Federal Regulations are reproduced in the appendix to AT&T California's petition. The missing provisions – an additional excerpt from 47 C.F.R. § 51.5 and 47 C.F.R. § 51.505 – are set forth in the Appendix to this response.

INTRODUCTION

On September 1, 2010, the United States Court of Appeals for the Ninth Circuit correctly held that competitive local exchange carriers (CLECs) are entitled under the Act and implementing Federal Communications Commission (FCC) orders to use certain incumbent local exchange carrier (ILEC)-owned transmission equipment – called entrance facilities – at regulated, cost-based rates when such entrance facilities are used to interconnect the ILEC and CLEC telecommunications networks. The Seventh and Eighth Circuits agree; in a split decision, the Sixth Circuit does not.

On December 10, 2010, the Court granted certiorari in the Sixth Circuit case in *Talk America Inc. v. Michigan Bell Tel. Co.* (No. 10-313) and *Isiogu v. Michigan Bell Tel. Co.* (No. 10-329) (consolidated). The *Talk America* and *Isiogu* petitions present the same legal question regarding the Act's treatment of

entrance facilities that AT&T California raises in its petition here, as restated by the CPUC and its Commissioners above. *See supra* at i. On February 3, 2011, the CPUC submitted a brief amicus curiae in *Talk America* and *Isiogu* in support of petitioners and in continued support of its own decision ruling that ILECs must provide CLECs with entrance facilities used for interconnection at cost-based rates.

Although the CPUC and its Commissioners waived their brief in opposition to AT&T California's petition in light of the grant of certiorari in *Talk America* and *Isiogu,* the Court requested that the CPUC nonetheless respond to the petition. As set forth below (and in the January 10, 2011 waiver letter), respondents CPUC and its Commissioners believe that the Ninth Circuit reached the correct conclusion in the decision below but respectfully request the Court to hold AT&T California's petition pending the Court's decision in *Talk America* and *Isiogu*.

STATEMENT

Telephone Networks and the Two Uses of Entrance Facilities, Interconnection and Backhaul. In the current local telecommunications market, ILECs have their own separate infrastructures of wires and switches (computers that direct calls to their destinations), called networks, to move calls from one caller to another within their respective

networks. CLECs often have their own networks as well. The telecommunications equipment at issue in this case – called an entrance facility – is a type of transmission facility (*i.e.*, a high capacity wire) that connects ILEC and CLEC networks, such that telephone traffic can transfer seamlessly from one carrier's network to another. *Triennial Review Remand Order (TRRO)* ¶ 136;[2] *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, 621 F.3d 836, 841-42, 844 (9th Cir. 2010), Pet. App. 8a, 13a.[3]

Entrance facilities have two different uses. First, for the telephone system to function, carriers must be able to "interconnect" – that is, calls must be able to move from one carrier's customer (located in that carrier's network) to another carrier's customer (located in the second carrier's network). *Pacific Bell*, 621 F.3d at 842, Pet. App. 8a-9a. *See* Br. Amicus Curiae of CPUC in Supp. of Pet'rs at 3-5, App. 1 (Diagram 1 illustrating example of interconnection), *Talk America*, U.S. No. 10-313, & *Isiogu*, U.S. No. 10-329 (Feb. 3, 2011).

A CLEC also can use an entrance facility to move its own customers' traffic from an ILEC's central office to the CLEC's switch. Using an entrance facility

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[2] Order on Remand, *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 20 FCC Rcd. 2533 (2005), *aff'd, Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[3] References to "Pet. App." are to the appendix to AT&T California's petition.

in this fashion – to route traffic to and from a CLEC's end users located in the ILEC's service territory – is known as an example of "backhauling" or "backhaul." *Pacific Bell*, 621 F.3d at 842, Pet. App. 9a. With backhaul, no traffic is exchanged between the ILEC and CLEC networks. *See* Br. Amicus Curiae of CPUC at 5-6, App. 1 (Diagram 1 illustrating example of backhaul), *supra* at 3.

Contrary to AT&T California's characterization otherwise, the diagram in the Ninth Circuit's decision – albeit a simplified version of the diagrams the CPUC and AT&T California submitted – accurately depicts what an entrance facility is and its two different functions. *See Pacific Bell*, 621 F.3d at 842, Pet. App. 9a. AT&T California apparently believes the diagram places the entrance facility in, rather than connected to, the ILEC's switching facility (*i.e.*, the tandem office). Pet. for Writ of Cert. 3 n.3. However, it is evident from the text of the decision that the Ninth Circuit understood how an entrance facility works. The court correctly described an entrance facility as a "high capacity wire that links telephone networks" and explained how the same entrance facility can be used for both interconnection and backhaul. *Pacific Bell*, 621 F.3d at 842, Pet. App. 8a.

The Telecommunications Act of 1996 and the FCC's Implementing Orders. Congress addressed interconnection in the Act. 47 U.S.C. §§ 201 *et seq*. (2011). The Act was designed to foster rapid development of competition in local telecommunications services by requiring ILECs, such as AT&T

California, to share their networks with competitors seeking entry into the traditionally monopolistic local service market. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

Pursuant to section 251 of the Act, ILECs must provide interconnection for the CLECs' facilities and equipment "at any technically feasible point within the [ILEC's] network." 47 U.S.C. § 251(c)(2). As described above, interconnection is the "physical linking of two networks for the mutual exchange of traffic." *Local Competition Order* (*LCO*)[4] ¶ 176; 47 C.F.R. § 51.5 (2011). *See also* 47 C.F.R. § 51.5 (defining "technical feasibility" in broad terms), § 51.321 (listing some examples of technically feasible interconnection).[5]

Separate and distinct from the interconnection obligation, ILECs also must provide CLECs with access to the ILECs' "unbundled network elements," *e.g.*, loops (the wires that connect telephones to switches), switches, and transport facilities. 47 U.S.C. § 251(c)(3). This requirement allows competitors to lease parts of the ILECs' networks so that the competitors can compete with the ILECs without building their own separate networks at significant expense.

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[4] First Report & Order, *Implementation of Local Competition Provisions in Telecomms. Act of 1996*, 11 FCC Rcd. 15499 (1996) (subsequent history omitted).

[5] In its petition, AT&T California does not address (much less discuss the significance of) section 251(c)(2) of the Act. *See* Pet. for Writ of Cert. 2-5.

To determine what network elements ILECs must make available under section 251(c)(3), the FCC must consider whether the failure to provide access to the network elements would "impair" the CLEC's ability to provide telecommunications service. *Id.* § 251(d)(2).

The rates ILECs charge for section 251(c)(2) interconnection and section 251(c)(3) access to unbundled network elements must be based on the ILECs' cost. *Id.* § 252(d)(1). Pursuant to FCC rules, ILECs must use a pricing methodology known as "total element long-run incremental cost," or TELRIC. *See* 47 C.F.R. § 51.505(b); *Verizon Commc'ns v. FCC*, 535 U.S. 467, 523 (2002) (upholding TELRIC).

The FCC implemented these provisions of the Act in the 1996 *LCO*,[6] the 2003 *Triennial Review Order* (*TRO*),[7] and the 2005 *TRRO*.[8] In the *LCO*, the FCC broadly interpreted the section 251(c)(2) interconnection duty. In the *TRO*, the FCC distinguished between the interconnection and backhaul uses of entrance facilities and concluded that ILECs no longer needed to provide CLECs with entrance facilities used for backhaul on an unbundled basis under section 251(c)(3).

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[6] *See supra* note 4.

[7] Report & Order & Order on Remand & Further Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, 18 FCC Rcd. 16978 (2003) (subsequent history omitted).

[8] *See supra* note 2.

Finally, in the *TRRO*, the FCC confirmed that it was eliminating the ILECs' duty under section 251(c)(3) to provide CLECs with entrance facilities used for backhaul. *See TRRO* ¶¶ 138-141; 47 C.F.R. § 51.319(e)(2)(i). In contrast, with regard to interconnection facilities, the FCC stated:

> We note in addition that our finding of non-impairment with respect to entrance facilities *does not alter the right of competitive LECs to obtain interconnection facilities pursuant to Section 251(c)(2)* for the transmission and routing of telephone exchange service and exchange access service. [n.394 *Triennial Review Order*, 18 FCC Rcd at 17204, para. 366.] Thus, competitive LECs *will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network*.

TRRO ¶ 140 (emphasis added).

The Proceedings Below. Following issuance of the *TRO* and the *TRRO*, AT&T California and a number of CLECs sought to negotiate changes to their interconnection agreements in California. The parties were unable to agree on all issues, and AT&T California initiated a consolidated arbitration proceeding at the CPUC pursuant to section 252(b) of the Act.

In 2006, the CPUC issued a decision requiring AT&T California to provide the CLECs with entrance facilities used for interconnection at cost-based rates pursuant to section 251(c)(2) of the Act, the *TRO*, and

the *TRRO*. Pet. App. 84a-86a. In 2007, the CPUC denied rehearing of its decision with regard to the entrance facility issue. Pet. App. 74a-79a.

AT&T California filed an action in the United States District Court for the Northern District of California, seeking review of the CPUC's decision. On cross-motions for summary judgment, the district court ruled in the CPUC's favor. *Pacific Bell Tel. Co. v. California Pub. Utils. Comm'n*, No. 07-1797, 2008 WL 501390, at *6-7 (N.D. Cal. Feb. 21, 2008), Pet. App. 58a-61a. The Ninth Circuit affirmed the district court's decision in March 2010. *Pacific Bel Tel. Co. v. California Pub. Utils. Comm'n*, 597 F.3d 958, 965-69 (9th Cir. 2010), Pet. App. 32a-40a.

Just days before the Ninth Circuit issued its decision, the Sixth Circuit – in a case addressing the same entrance facility issue, with the same factual background and procedural posture – issued its split decision ruling the opposite way. *Michigan Bell Tel. Co. v. Covad Commc'ns Co.*, 597 F.3d 370 (6th Cir. 2010). In September 2010, the Ninth Circuit denied AT&T California's petition for rehearing and issued an amended decision "reject[ing] the reasoning advanced by AT&T and the Sixth Circuit in its recent 2-1 decision." *Pacific Bell*, 621 F.3d at 844, Pet. App. 12a-13a.

On December 10, 2010, this Court granted certiorari in the Sixth Circuit case on the same entrance facility issue. *See Talk America*, No. 10-313, & *Isiogu*, No. 10-329. AT&T California filed this petition for a

writ of certiorari on December 23, asking the Court to hold the petition pending the Court's decision in *Talk America* and *Isiogu*. *See* Pet. for Writ of Cert. 7. By letter to the Clerk of the Court dated January 10, 2011, the CPUC and its Commissioners waived their brief in opposition to the petition in light of the Court's grant of certiorari in *Talk America* and *Isiogu*.

On February 3, 2011, the CPUC filed an amicus brief on the merits in support of the petitioners in *Talk America* and *Isiogu* with regard to the entrance facility issue. Br. Amicus Curiae of CPUC, *supra* at 3. By letter dated February 18, 2011, the Court requested that the CPUC file a response to this petition, despite the CPUC's waiver. Oral argument in the *Talk America* and *Isiogu* cases is scheduled for March 30, 2011.

ARGUMENT

I. THE COURT SHOULD HOLD THE PETITION PENDING THE COURT'S DECISION IN *TALK AMERICA* AND *ISIOGU*

The CPUC and its Commissioners believe the Ninth Circuit reached the correct decision. *See infra* § II. However, in light of the identical nature of the entrance facility issue in both this petition and the *Talk America* and *Isiogu* petitions, it is appropriate for the Court to hold this petition pending the Court's decision in *Talk America* and *Isiogu*.

In 2008, both the Seventh and Eighth Circuits held that, pursuant to section 251(c)(2) of the Act and

the implementing FCC orders, ILECs must provide CLECs with entrance facilities at cost-based rates, when the CLECs wish to use the entrance facilities for the purpose of interconnection. *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 530 F.3d 676, 683-84 (8th Cir. 2008); *Illinois Bell Tel. Co. v. Box*, 526 F.3d 1069, 1071-72 (7th Cir. 2008). In a split decision in February 2010, the Sixth Circuit took the opposite view, holding that ILECs were under no obligation to provide any entrance facilities – regardless of the use – and rejecting the Michigan Public Service Commission's decision that CLECs have a right to entrance facilities used for interconnection pursuant to section 251(c)(2). *See infra* § III. The Ninth Circuit then issued its decision, agreeing with the Seventh and Eighth Circuits.

On December 10, 2010, the Court granted certiorari in the Sixth Circuit in *Talk America* and *Isiogu*. AT&T California filed its petition for a writ of certiorari in this case on December 23, 2010.

The entrance facility question presented in both the *Talk America* and *Isiogu* cases and this case is identical: whether section 251(c)(2) of the Act and the implementing FCC orders require ILECs to lease their entrance facilities to CLECs at regulated, cost-based rates when the CLECs use the entrance facilities for the purpose of interconnection. The factual backgrounds of the cases are the same as well, as they deal with ILECs' provision and pricing of the same piece of telecommunications equipment: an entrance facility.

Finally, the procedural postures of the cases are also the same: (1) a state commission originally decided the issue; (2) the state commissions both ruled that ILECs must provide CLECs with entrance facilities used for interconnection at cost-based rates pursuant to section 251(c)(2); (3) the ILECs challenged the state commissions' decisions under section 252(e)(6) as an appeal based on an administrative record; and (4) the district courts resolved the issue via cross-motions for summary judgment.[9] For these reasons, the CPUC and its Commissioners respectfully request the Court to hold AT&T California's petition until resolution of *Talk America* and *Isiogu*, oral argument for which is scheduled for March 30, 2011.

II. THE SEVENTH, EIGHTH, AND NINTH CIRCUITS REACHED THE CORRECT RESULT

As the CPUC set forth in its amicus brief in *Talk America* and *Isiogu*, the Ninth Circuit – along with the Seventh and Eighth Circuits before it – properly concluded that ILECs must provide their entrance facilities to CLECs at cost-based rates to allow the customers of each to talk to one another. Section 251(c)(2) of the Act requires ILECs to provide CLECs with interconnection at cost-based rates, and an

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[9] The only difference is that the Ninth Circuit agreed with the CPUC, while the Sixth Circuit disagreed with the Michigan Public Service Commission.

entrance facility is just such a piece of equipment used to achieve interconnection – *i.e.*, a physical link between networks. *Pacific Bell*, 621 F.3d at 844, Pet. App. 13a. *See* Br. Amicus Curiae of CPUC at 13-15, *supra* at 3.

The FCC's implementing orders support this interpretation. First, in the *LCO*, the FCC broadly interpreted the section 251(c)(2) interconnection duty to require ILECs to provide CLECs a wide range of physical facilities CLECs can use to interconnect their networks with the ILECs' networks, at locations of the CLECs' choosing. *Pacific Bell*, 621 F.3d at 845-46, Pet. App. 16a. *See* Br. Amicus Curiae of CPUC at 16-22, *supra* at 3. In the subsequent *TRO*, the FCC took that broad interconnection duty and articulated a specific duty with regard to entrance facilities. *Pacific Bell*, 621 F.3d at 846, Pet. App. 16a-18a. The FCC concluded that ILECs no longer had to provide entrance facilities used for backhaul on an unbundled basis under section 251(c)(3), but did not touch the ILECs' duty to provide entrance facilities used for interconnection under section 251(c)(2). *Id.*, Pet. App. 17a. *See* Br. Amicus Curiae of CPUC at 22-25, *supra* at 3.

Ultimately, in the *TRRO*, the FCC found CLECs without access to entrance facilities to be unimpaired and thus declassified entrance facilities used for backhaul as an unbundled network element under section 251(c)(3). The FCC continued to recognize the two different uses of entrance facilities, however, and, in paragraph 140, explicitly reaffirmed that its

unbundling decision under section 251(c)(3) did not affect the section 251(c)(2) requirement (interpreted by the FCC in the *LCO* and the *TRO*) that ILECs provide interconnection facilities at cost-based rates. *Pacific Bell*, 621 F.3d at 845, Pet. App. 15a-16a. *See* Br. Amicus Curiae of CPUC at 26-33, *supra* at 3. The Ninth Circuit, therefore, reached the correct conclusion.

III. THE SIXTH CIRCUIT ERRED IN HOLDING THAT AN ILEC'S ONLY DUTY IS TO ALLOW A CLEC TO "PLUG IN" ITS OWN EQUIPMENT INTO THE ILEC'S NETWORK

The Sixth Circuit rejected the reasoning of the Seventh, Eighth, and Ninth Circuits. Instead, the panel majority concluded that paragraph 140 of the *TRRO* merely provides that, if a CLEC builds its own entrance facility, the ILEC must let the CLEC hook that entrance facility up to the ILEC's network by providing a different "interconnection facility" – nothing more than a place for the CLEC to "plug in" – at regulated rates. As the CPUC explained in its amicus brief in *Talk America* and *Isiogu*, however, the panel majority not only made a number of analytical errors, but also improperly substituted its own definition of entrance facility in place of the FCC's.

First, the panel majority mistakenly concluded that an entrance facility used for interconnection is not a type of interconnection facility – *i.e.*, that the FCC used the terms "entrance facilities" and "interconnection facilities" to refer to different pieces of

equipment. *See* Br. Amicus Curiae of CPUC at 33-35, *supra* at 3. Second, the panel majority improperly read the FCC's regulation eliminating the unbundling requirement (47 C.F.R. § 51.319(e)(2)(i)) to mean that the FCC had removed the ILECs' duty to provide *all* entrance facilities, regardless of how the CLEC uses them, thus collapsing the section 251(c)(2) interconnection and section 251(c)(3) unbundling obligations. *See* Br. Amicus Curiae of CPUC at 35-37, *supra* at 3; *Pacific Bell*, 621 F.3d at 845, Pet. App. 15a ("the duties of incumbent LECs under 47 U.S.C. § 251(c)(2) and § 251(c)(3) are independent").

Third, the panel majority erroneously rejected the distinction between the backhaul and interconnection uses of entrance facilities, as the FCC laid out in the *TRO*. *See Pacific Bell*, 621 F.3d at 846 n.15, 841 (explaining that *TRO* paragraphs 365 and 366 regarding entrance facilities' interconnection and backhaul uses are still good law), Pet. App. 18a n.15, 7a. *See* Br. Amicus Curiae of CPUC at 37, *supra* at 3.

Finally, in ultimately concluding that all an ILEC must do under section 251(c)(2) is make a "plug-in" location available to the CLEC, and not provide any actual equipment to facilitate that connection, the panel majority improperly limited that CLEC's interconnection choices, in direct conflict with both the Act and the FCC's orders. No longer is a CLEC able to interconnect via "any technically feasible" method under the statute; rather, the ILEC is given the power to choose whether a piece of equipment is an

entrance facility or an interconnection facility. *See* Br. Amicus Curiae of CPUC at 38, *supra* at 3.

CONCLUSION

For the reasons stated above, the CPUC respectfully requests the Court to hold AT&T California's petition pending the Court's decision in *Talk America* and *Isiogu* on the same issue.

Respectfully submitted,

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APPENDIX

ADDITIONAL STATUTORY AND REGULATORY PROVISIONS INVOLVED

47 C.F.R. § 51.5 (excerpt):

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

* * *

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

* * *

47 C.F.R. § 51.505:

§ 51.505 Forward-looking economic cost.

(a) *In general.* The forward-looking economic cost of an element equals the sum of:

(1) The total element long-run incremental cost of the element, as described in paragraph (b); and

(2) A reasonable allocation of forward-looking common costs, as described in paragraph (c).

(b) *Total element long-run incremental cost.* The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.

(1) *Efficient network configuration.* The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.

(2) *Forward-looking cost of capital.* The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element.

(3) *Depreciation rates.* The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.

(c) *Reasonable allocation of forward-looking common costs.*

(1) *Forward-looking common costs.* Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent LEC) that cannot be attributed directly to individual elements or services.

(2) *Reasonable allocation.*

(i) The sum of a reasonable allocation of forward-looking common costs and the total element long-run incremental cost of an element shall not exceed the stand-alone costs associated with the element. In this context, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but that given element.

(ii) The sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC's total network, so as to provide all the elements and services offered.

(d) *Factors that may not be considered.* The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:

(1) *Embedded costs.* Embedded costs are the costs that the incumbent LEC incurred in the past and

that are recorded in the incumbent LEC's books of accounts;

(2) *Retail costs.* Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in § 51.609;

(3) *Opportunity costs.* Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carriers that purchase elements; and

(4) *Revenues to subsidize other services.* Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

(e) *Cost study requirements.* An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511.

(1) A state commission may set a rate outside the proxy ranges or above the proxy ceilings described in § 51.513 only if that commission has given full and fair effect to the economic cost based pricing methodology described in this section and § 51.511 in a state

proceeding that meets the requirements of paragraph (e)(2) of this section.

(2) Any state proceeding conducted pursuant to this section shall provide notice and opportunity for comment to affected parties and shall result in the creation of a written factual record that is sufficient for purposes of review. The record of any state proceeding in which a state commission considers a cost study for purposes of establishing rates under this section shall include any such cost study.
